POWERS
PYLES
SUTTER &
VERVILLE PC
ATTORNEYS AT LAW

Twelfth Floor
1875 Eye Street, NW
Washington, DC 20006-5409
Phone: (202) 466-6550
Fax: (202) 785-1756
www.ppsv.com

JAMES C. PYLES
(202) 872-6731
Jim.Pyles@ppsv.com

October 19, 2006

By Hand Delivery

Clerk
Ms. Leslie Gradet
Maryland Court of Special Appeals
361 Rowe Blvd.
2nd Floor
Annapolis, MD 21401

Re: **Maryland State Board of Physicians v. Harold I. Eist, M.D.**
Case No. 00329

Dear Ms. Gradet:

Please accept for filing in this case the original and five copies of the Brief of Amici Curiae, Motion to File Brief and Proposed Order.

Please do not hesitate to contact me if you need further information.

Very truly yours,

James C. Pyles

Enclosures

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

September Term, 2006

No. 00329

MARYLAND STATE BOARD OF PHYSICIANS

Appellant,

v.

HAROLD I. EIST, M.D.

Appellee.

On Appeal from the Circuit Court for Montgomery County
(Durke Thompson, Judge)

Motion to File Brief of Amici Curiae

The state and national psychotherapy practitioner and patient associations listed below request the Court to accept for filing in this case their Brief of Amici Curiae. The right to privacy of mental health records which is at issue in this case is of profound interest to each of these organizations. It is the belief of these organizations that the policy adopted and applied by the Maryland Board of Physicians in this case poses a serious threat to the right to privacy of mental health records as protected by the United States Constitution, the psychotherapist-patient privilege and the standards for the ethical practice of psychiatry and psychotherapy. These organizations all believe that the reasonable expectation that

the communications between a psychotherapist and a patient will remain private, subject to the consent of the patient, is essential for effective psychotherapy. Thus, these organizations believe that the state's policy that is at issue in this case will adversely affect the quality of psychotherapy in Maryland as well as across the nation.

In addition, these organizations believe that it would be helpful to the Court to have the benefit of their perspective regarding the adverse impact that the board's policy is likely to have on the ethical practice of psychotherapy in Maryland and elsewhere.

Counsel for amici curiae has contacted counsel for Appellant and Appellee to request their consent to file this brief. Counsel for Appellee has given his consent but Counsel for Appellant has indicated that he does not consent.

Accordingly, these organizations ask that this motion be granted.

Washington Psychiatric Society

American Association of Practicing Psychiatrists

American Psychiatric Association

American Psychoanalytic Association

American Academy of Psychoanalysis and Psychodynamic Psychiatry

American Association for Social Psychiatry

Association of American Physicians & Surgeons, Inc.

Baltimore-Washington Psychoanalytic Society

Child and Adolescent Psychiatric Society of Greater Washington

Delmarva Psychiatry Group, Inc.

JustHealth

Maryland Psychiatric Society

Maryland State Medical Society

Massachusetts Psychiatric Society

Mississippi Psychiatric Association

National Alliance of the Mentally Ill, 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

Patient Privacy Rights

Program in Psychiatry and the Law, Beth Israel Deaconess Medical Center, Harvard Medical School

Psychiatric Society of Delaware

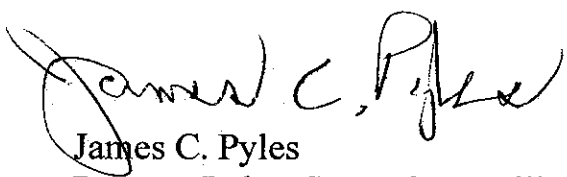
Psychiatric Society of Virginia

Psychoanalytic Institute of New England East (PINE)

Suburban Maryland Psychiatric Society

Vermont Psychiatric Association

Respectfully submitted,



James C. Pyles
Powers, Pyles, Sutter & Verville, P.C.
1875 Eye Street, N.W., 12TH Floor
Washington, D.C. 20006
(202) 466-6550

October 20, 2006

Certificate of Service

I certify that I have served, by U.S. mail, a copy of the Motion to File Brief of Amici Curiae on counsel for the Appellant and the Appellee at the addresses listed below.

Thomas W. Keech
Assistant Attorney General
300 West Preston Street, Suite 302
Baltimore, Maryland 21201

Alfred F. Belcuore
Montedonico, Belcuore & Tazzara, P.C.
1020 Nineteenth Street, N.W., Suite 420
Washington, D.C. 20036

James C. Pyles

October 20, 2006

September Term, 2006

No. 00329

MARYLAND STATE BOARD OF PHYSICIANS

Appellant,

v.

HAROLD I. EIST, M.D.

Appellee.

On Appeal from the Circuit Court for Montgomery County
(Durke Thompson, Judge)

ORDER

For the reasons cited in the Amici Curiae Motion to File Brief, that motion is hereby GRANTED. This ____ day of _____, 2006.

_____
Judge, Court of Special Appeals

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

September Term, 2006

No. 00329

MARYLAND STATE BOARD OF PHYSICIANS

Appellant,

v.

HAROLD I. EIST, M.D.

Appellee.

On Appeal from the Circuit Court for Montgomery County
(Durke Thompson, Judge)

Brief of Amici Curiae

Washington Psychiatric Society
American Association of Practicing Psychiatrists
American Psychiatric Association
American Psychoanalytic Association
American Academy of Psychoanalysis and Psychodynamic Psychiatry
American Association for Social Psychiatry
Association of American Physicians & Surgeons, Inc.
Baltimore-Washington Psychoanalytic Society
Child and Adolescent Psychiatric Society of Greater Washington
Delmarva Psychiatry Group, Inc.
JustHealth
Maryland Psychiatric Society
Maryland State Medical Society

Massachusetts Psychiatric Society
Mississippi Psychiatric Association
National Alliance of the Mentally Ill, 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
Patient Privacy Rights
Program in Psychiatry and the Law, Beth Israel Deaconess Medical Center, Harvard Medical School
Psychiatric Society of Delaware
Psychiatric Society of Virginia
Psychoanalytic Institute of New England East (PINE)
Suburban Maryland Psychiatric Society
Vermont Psychiatric Association

James C. Pyles
Powers, Pyles, Sutter, & Verville, P.C.
1875 Eye Street N.W.
Washington, D.C. 20006
(202) 466-6550

Attorney for Amici Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

Table of Authorities

Page

Cases

TABLE OF AUTHORITIES (Continued)

Page

Statutes

Other Authorities

STATEMENT OF INTEREST

By taking this appeal, the Maryland State Board of Physicians (MSBP) seeks to have this Court approve a policy of automatic compelled disclosure of mental health records as a preliminary step in any investigation of a complaint filed by a third party regardless of the patients' objections and the adverse effect on their ongoing treatment. The national and state mental health practitioner and patient associations described in the Appendix believe that the MSBP's policy is invalid because it is in clear conflict with the patients' right to privacy protected by the Fourteenth Amendment to the United States Constitution, the psychotherapist-patient privilege, established standards for the ethical practice of psychiatry, and the law of this case.

From a practical standpoint, Amici believe that the MSBP's policy of automatic compelled disclosure of patients' psychiatric records will impair or destroy the "atmosphere of confidence and trust" the United States Supreme Court has recognized is essential for effective psychotherapy. Jaffee v. Redmond, 518 U.S. 1, 10, 116 S. Ct. 1923, 1928 (1996). 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. 518 U.S. at 12, 116 S. Ct. at 1929. Further, these organizations believe that the MSBP'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 MSBP's inflexible policy. Finally, these organizations believe that sanctioning a psychiatrist for defending his patients' rights to privacy and the ethical practice of psychiatry could discourage psychiatrists from adhering to their standards of ethics and putting the patients' interest first.[1] For all of

[1] 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", Psychiatric News, 38: 1-27 (December 2003). More recently, Dr. Eist received the Maryland State Medical Society (MedChi) H. Margret 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." (October 1, 2006).

these reasons, the Amici believe that the MSBP's policy is in conflict with its duty to ensure the safe and ethical practice of psychiatry in the State of Maryland.

Issues Before the Court

The MSBP's policy, as applied in this case, has been found by independent triers of fact on four occasions to violate patients' constitutional rights to privacy and practitioners' established standards of ethics. Such a determination was made twice by Administrative Law Judges and by two different judges for the Circuit Court for Montgomery County, Maryland. E. 33, 125, 190. In a ruling issued on August 15, 2003, the Circuit Court ruled that the "real issue" in the case was whether the MSBP's "absolutist" policy, that "at all times a patient's right to privacy is outweighed by [the MSBP's] need for information", is lawful. E. 174. The Court ruled unequivocally that the MSBP's policy was "an error of law." E. 174-175, 177.

The Court also held that the MSBP was wrong in concluding that Dr. Harold Eist must have been acting in bad faith when he sought to reconcile the MSBP's demand for his patients' psychiatric records with their objections to disclosure of those records. E. 177. The Court remanded the case for a factual hearing to balance the privacy interests of the patients against the MSBP's interest in disclosure of the records to determine "whether or not upon consideration of those factors [recognized under Maryland case law], the subpoena should have issued." E. 179. The state did not take an appeal from the Court's order.

On remand, an Administrative Law Judge held that:

- the MSBP had applied its "absolutist" policy and did not apply the factors required by controlling Maryland case law to the facts of this case,
- Dr. Eist had acted in good faith on advice of counsel and had not failed to cooperate with an MSBP investigation; accordingly,
- Dr. Eist should not have been fined or disciplined by the MSBP. E. 222.

In a ruling dated June 22, 2005, the MSBP again upheld the application of its absolutist policy of automatic compelled disclosure concluding that the MSBP's interest

in obtaining information always overrides the patients' interest in privacy and the practitioner's standards of ethics. E. 10. In an Order and Final Judgment dated March 29, 2006, the Circuit Court vacated the sanctions against Dr. Eist and again ruled that, "as a matter of law," the MSBP's policy is in conflict with controlling Maryland case law. E. 107.

Thus, the issues before this Court are

A) Whether the MSBP's policy of automatic compelled disclosure of all mental health records as a "preliminary step" in any investigation (1) is justified by a compelling state interest, (2) is narrowly tailored to minimize infringement of the patients' right to privacy, (3) uses the "least intrusive" alternative in accomplishing its objectives, and (4) applied the balancing factors required by Maryland common law.

B) Whether Dr. Eist acted reasonably and in good faith by offering to cooperate with the MSBP while heeding his patients' objections to disclosure of their mental health records and adhering to his standards of professional ethics.

Amici believe the MSBP's policy is in conflict with Maryland law, the United States Constitution, and the ethical practice of psychiatry. Accordingly, the decision of the Circuit Court dismissing all charges against Dr. Harold Eist should be affirmed. E. 34.

Significant Facts

Certain significant facts in this case illustrate the conflict of the MSBP's policy with the patients' rights to privacy and the ethical practice of psychiatry.

1. This case began when the estranged husband of a mother and her two minor children who were receiving psychiatric treatment from Dr. Eist filed a complaint with the MSBP that Dr. Eist was overmedicating the wife and children. State's Br. 4. At the time of the complaint, the husband and wife

were involved in bitterly contested divorce and child custody proceedings. E. 195-196. See also, E. 10.

2. The mother and children strongly objected to the disclosure of their psychiatric records in response to the subpoena issued to Dr. Eist by the MSBP as a result of the estranged husband's complaint. E. 197.
3. They registered those objections with Dr. Eist and with the MSBP, directly and through independent counsel for the mother and the children. E. 197.
4. The MSBP completely ignored and overrode those objections by applying its policy of automatically compelling disclosure of the entire psychiatric record as a preliminary step in investigating any complaint. E. 196, 198, 210-211.
5. Dr. Eist never indicated that he would not cooperate with the MSBP's investigation but merely asked that it reconcile its demand with his patients' objections. E. 221.
6. Patient A, as well as Patients B and C, were understandably concerned that disclosure of their psychiatric information in response to the complaint could destroy their family as well as their right to privacy. E. 213.
7. Dr. Eist sought to uphold his standards of professional ethics which require patient consent for the disclosure of psychiatric communications while the MSBP ignored those standards. E. 217.
8. The treatment relationship between Dr. Eist and the patients was ongoing at the time of the MSBP's demand so the potential for damage to the therapeutic relationship was substantial. E. 213.
9. Dr. Eist conferred with counsel and with counsel for his patients and followed their advice and direction. E. 11-12, 198.
10. Dr. Eist provided the records demanded by the subpoena after giving the patients an opportunity to intervene. E. 12.
11. The original complaint that Dr. Eist had overmedicated his patients was reviewed by a peer review committee and found to be without merit, and

the MSBP decided to not charge him with any violation of a standard of care in the treatment of his patients. E. 12.

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

So this nearly six-year campaign by the MSBP to sanction Dr. Eist is essentially based on his alleged failure to comply with MSBP's subpoena quickly enough.

Argument

I. The MSBP's "Absolutist" Policy Fails to Consider the Facts

In its brief, the state cites certain findings by the MSBP that it views as "critical" to its position. Those are that

a) the MSBP's "policy" when it receives a complaint is to subpoena the entire medical record "as part of its preliminary investigation";

b) the only exceptions are when a psychiatric patient alleges a "plainly impossible set of facts", when the offense alleged does not violate the law, or when the facts would not be found in the medical record; and

c) the MSBP "always go[es] for the medical record" even in psychiatric cases, and has done so for twelve years.

State's Br. at 13-14. While the MSBP's decision contains a perfunctory analysis of the factors required under Maryland case law to determine whether the patient's right to privacy can be violated (E. 13-22), the MSBP's policy simply does not allow the facts or factors to be taken into account, nor were they taken into account in this case. See ALJ Conclusions of Law, E. 222.

Under Maryland law, the MSBP does not have the power to compel the automatic disclosure of highly sensitive patient psychiatric information. It is well-established that the MSBP only has the power to regulate the practice of medicine "within constitutional

limitations." Dr. K. v. State Bd. of Physician Quality Assurance, 98 Md. App. 103, 120, 632 A. 2d 453, 461 (1993), cert. denied, 334 Md. 18, 637 A. 2d 1191, cert. denied, 513 U.S. 817, 115 S. Ct. 75 (1994).

It is further well-established that the right to privacy for medical records, and specifically psychiatric records, is protected by the federal constitution. 98 Md. App. at 111-114, 632 A. 2d at 457-459; Shady Grove Psychiatric Group v. State of Maryland, 128 Md. App. 163, 179, 736 A. 2d 1168, 1177 (Md. 1999). That constitutionally protected right to privacy can only be overridden by the state's showing, based on "the specific facts of the case", that the societal interest in disclosure outweighs the patients' privacy interest. 98 Md. App. at 114, 632 A. 2d at 459. See also, Doe v. Maryland Board of Soc. Work Ex., 384 Md. 161, 186, 862 A. 2d 996, 1010 (Md. 2004). The MSBP's policy in this case, however, is expressly designed to, and did in fact, exclude consideration of the facts with respect to the patients' right to privacy. The policy automatically compels the disclosure of the entire mental health record as a preliminary "first step" whenever a complaint is filed. Such a policy is, therefore, plainly beyond the power of the MSBP to adopt and apply.

II. The Right to Privacy of Psychiatric Information is a Fundamental Right that Can Only Be Infringed By Proof of an Overriding Compelling Interest

A. The Right to Privacy for Mental Health Records is a Fundamental Constitutional Right

Fundamental liberty interests protected by the Due Process Clause of the 5th and 14th Amendments are those that are "deeply rooted in the nation's history and tradition" and are "implicit in the concept of ordered liberty." Washington v. Glucksberg, 521 U.S. 702, 720-21, 117 S. Ct. 2258, 2268 (1997). The right to privacy of highly personal information has been expressly recognized by Congress as a "fundamental right protected by the Constitution of the United States." Pub. L. 93-579, section 2, "Congressional Findings and Statement of Purpose," Privacy Act of 1974. The United States Department of Health and Human Services has also determined that "[p]rivacy is a fundamental

right." Preamble to Health Information Privacy Rule under the Health Insurance Portability and Accountability Act of 1996 (HIPAA). 65 Fed. Reg. at 82,464 (December 28, 2000).

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 health practitioner 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.
>
> 3. 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.
>
> 4. 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 Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry, The American Psychiatric Association, Section 4 Confidentiality (2003) (emphasis added).

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." Principles and Standards of Ethics for Psychoanalysts, The American Psychoanalytic Association, 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." Social Work Speaks, 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.

The Supreme Court's exhaustive survey of the nation's "reason and experience" under both federal and state laws led to the conclusion that the psychotherapist-patient

privilege is "rooted in the imperative need for confidence and trust." Jaffee v. Redmond, 518 U.S. at 10, 116 S. Ct. at 1928. The Court noted that the Judicial Conference Advisory Committee observed in 1972 that a psychiatrist's ability to help a patient is "completely dependent" upon the psychiatrist being able to assure the patient that disclosures in the course of treatment will not be further disclosed without the patient's permission. Id. 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 right to privacy for mental health records, therefore, is clearly a fundamental right "deeply rooted in the nation's history and tradition."

B. The Right to Mental Health Privacy Can Only Be Overridden by Proof of A Countervailing Compelling State Interest

Fundamental constitutional rights, such as the right to privacy for highly sensitive mental health records, are not absolute, but they can only be overridden by the state's showing of a "compelling state interest." Dr. K., 98 Md. App. at 111, 632 A. 2d at 457 (citing numerous cases). See also, Doe v. Md. Bd. of Soc. Work Ex., 384 Md. at 183, 862 A. 2d at 1008. The burden to show this overriding compelling interest is on the state. Doe, supra and 384 Md. at 192, 862 A. 2d at 1014, Raker and Battaglia, JJ. dissenting.

The state's contention that the burden is on Dr. Eist to prove that the Medical Practice Act and the Confidentiality of Medical Records Act are unconstitutional as applied to this case is mistaken since it is the MSBP's policy of automatic compelled disclosure that is at issue rather than the constitutionality of the statutes. State's Br. at 16-17. There is nothing in the statutes that compels the automatic disclosure of the patient's entire mental health record as part of a preliminary investigation of even the most frivolous complaint from a non-patient. See Md. Health Occ. Code Ann. §14-401(a) authorizing preliminary investigations.

If that were the effect of the statutes, then their constitutionality would be drawn into question. However, courts should avoid accepting interpretations of statutes that

would raise a serious constitutional question. DeBartolo Corp. v. Florida Gulf Coast Building and Const. Trade Council, 485 U.S. 568, 108 S. Ct. 1392, 1397 (1988). See also, Solid Waste Agency v. Army Corps of Engineers, 531 U.S. 159, 172, 121 S. Ct. 675, 683 (2001); U.S. v. X-Citement Video, Inc., 513 U.S. 64, 78, 115 S. Ct. 464, 472 (1994). There is no need to adopt the unconstitutional interpretation embodied in the MPSB's absolutist policy because it is not required by the statutes, nor has it been adopted in Dr. K or Doe.

The state's argument that this Court must defer to the MSBP's interest in obtaining the entire psychiatric record in every case is similarly erroneous. If that were the case, there would be no use in analyzing the factors and facts specified in Dr. K and Doe. Further, it is well established that "in cases that involve determining whether a constitutional right has been infringed, [courts] make an independent constitutional appraisal. Watkins v. Dep't. of Public Safety and Correctional Service, 377 Md. 34, 45-46, 831 A. 2d 1079 (2003). The obvious reason is that state agencies have no particular expertise in interpreting the federal constitution.

The MSBP's policy of total automatic compelled disclosure of mental health records regardless of the patients' wishes or adverse impact on treatment runs counter to its duty to protect the health and safety of Maryland citizens and to uphold the ethical practice of psychiatry. The Courts in Dr. K. and Doe both found that ensuring adherence to professional standards was the very basis of the board's power to act. Dr. K., 98 Md. App. at 110, 632 A. 2d at 456; Doe, 384 Md. at 189, 862 A. 2d at 1012. As Judge Thompson noted in his March 29, 2006 ruling in this case, the MSBP "is an appointed body staffed through taxpayer monies, charged with the responsibility of reviewing competency and ethical treatment by physicians." E. 103. The statute on which the MSBP relies to compel disclosure of the records also requires the board to protect the public from "unprofessional conduct in the practice of medicine." Md. Health Occ. Code Ann. §14-404(a)(3).

The MSBP's own decision states 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 MSBP's policy renders meaningless any theoretical opportunity for the patients to assert their constitutional right to privacy. The subpoena compelled Dr. Eist to disclose his patients' entire mental health records within 10 days. E. 10. However, the MSBP provided no notice to the patients. 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 must be disclosed. But taking such action would make little difference in any event since, according to the MSBP, its interest in compelling disclosure of all medical records always overrides the patient's privacy interest. E. 10.

Further, the MSBP has not shown why its duties could not have been discharged through the use of less intrusive alternatives. See finding to this effect by ALJ. E. 215. Indeed, the MSBP's policy does not appear to permit consideration of such alternatives. For example, the MSBP easily could have investigated the truthfulness of the allegations in the complaint by interviewing Dr. Eist and perhaps Patient A. The allegation was that Dr. Eist had overmedicated Patient A, to the point where she became anxious and depressed, and overmedicated her children with the result that one of the children exhibited increased behavior problems. State's Br. 4.

Certainly conferring with Patient A and Dr. Eist prior to compelling disclosure of the patients' records would have provided valuable information with respect to the validity of the allegation. Such an interview would have given the MSBP a better understanding of the credibility of the allegation.[2] The MSBP's decision does not

[2] The MSBP expressly ignored the credibility of the complainant and the circumstances as "not relevant factors." E. 20. The Court in Dr. K, however, held that the credibility of the complainant would have been important had the psychiatrist not admitted an ethical violation. 98 Md. App. at 107, 122.

indicate precisely what information necessary to resolve this complaint could not have obtained by simply interviewing Dr. Eist and Patient A.

Further, the MSBP'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 MSBP seemed to be "out to get Dr. Eist" rather than have a sincere interest in less intrusive means. E. 84. The MSBP never explains why requesting a limited amount of information, such as a list of medications, in conjunction with interviews, would not have allowed it to ensure that the patients had not been overmedicated.

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 MSBP. Practice guidelines for psychiatric organizations provide for such alternative processes. See, for example, "External Review of Psychoanalysis" in Practice Bulletin 3 of the American Psychoanalytic Association which provides:

> 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.

Had the MSBP used such a less intrusive alternative in this case, it would have learned immedately that the patients had not been overmedicated, and the patients' privacy and access to effective psychotherapy would not have been jeopardized.

Case law cited in its decision (E. 14) shows that the MSBP has employed less intrusive alternatives in the past. In Solomon v. State Board of Physician Quality Assurance, 155 Md. App. 687, 693, 845 A.2d 47, 51 (2004) the MSBP successfully investigated and resolved a quality of care complaint by means of an interview of the physician with no demand for the patients' entire medical records. On another occasion in that case, the MSBP narrowed the scope of its subpoenas to just a physician's "appointment schedule". Id. So the MSBP has used less intrusive alternatives in the past

to resolve quality of care complaints while preserving the patients' right to privacy. The ALJ in this case made a similar finding. E. 215-216.

III. The Compelling Interest Test Does Not Require a Balancing of Interests

The Court in Dr. K applied a "balancing test" to determine whether, on the specific facts of that case, the right to privacy could be overidden. However, it is important for the Court in this case to not perpetuate by repetition the application of a balancing test that is simply not supported by case law given the MSBP's "compelling interest" burden.

Dr. K. said it was adopting the "Third Circuit's reasoning" in the form of the "balancing test" set forth in United States v. Westinghouse Elect. Corp., 638 F.2d 570 (1980) to determine whether the state had an overriding compelling interest. However, the Third Circuit noted six years after Westinghouse, that the "compelling interest" analysis, without a balancing test, applies when there are "severe intrusions" on the constitutional right to privacy. Fraternal Order of Police v. City of Philadelphia, 812 F.2d 105, 110 (3rd Cir. 1987). Such intrusions are "severe" if they seek disclosure of highly personal information such as one's sexual history. Thorne v. City of El Segundo, 726 F.2d 459, 469 (9th Cir. 1983), cert. denied, 469 U.S. 979, 104 S. Ct. 548 (1983). Such "serious" violations of privacy are consistent with the Constitution only if they are necessary to promote a "compelling state interest." Whalen v. Roe, 429 U.S. 589, 606-07, 97 S. Ct. 869, 879-80 (1977) (Brennan, J. concurring).

The Third Circuit in Fraternal Order of Police made clear that the Westinghouse balancing test, by contrast, is applied in situations of less serious privacy violations.[3]

[3] The information at issue in Westinghouse was determined to be less sensitive because it was employee-employer information that the federal government sought in order to assess workplace safety. 638 F.2d at 573, n.1. It consisted of reports of general physical examinations and the employee's general medical history. The objection to disclosure was asserted by the employer rather than by the employees or their physicians. 638 F.2d at 573. There was no evidence that the information contained in the records was of such a high degree of sensitivity that the intrusion could have been considered "severe", and the information was maintained by the employer for the purpose of protecting the safety of the employees. 638 F.2d at 579. The court in Westinghouse recognized that, even so, some files could conceivably contain sensitive information, so it required a process under which employees would be given advance notice and an opportunity to object to the disclosure of specific information. 638 F.2d at 581. According to the court, the "touchstone" of the Due Process requirements is that the individuals be given advance "reasonable notice" and a meaningful opportunity to object to the disclosure of sensitive information. 638 F.2d at 582.

Recently, the Third Circuit has made it even more clear that the Westinghouse balancing test does not apply to situations involving highly sensitive personal information such as one's sexual orientation or results of a pregnancy test. Sterling v. Borough of Minersville, 232 F.3d 190, 196 (3rd Cir. 2000); Gruenke v. Seip, 225 F.3d 290 (3rd Cir. 2000). The patient information in this case was highly sensitive and personal and, therefore, is entitled to protection under the compelling interest-narrow tailoring-least intrusive means standard.

Moreover, two years after Dr. K. was decided, the Supreme Court, in deciding to recognize a federal psychotherapist-patient privilege under the Federal Rules of Evidence, expressly considered and rejected a balancing test in determining the privacy protections that should be afforded psychotherapy communications. The balancing test was rejected because psychotherapy patients "must be able to predict with some degree of certainty whether particular discussions will be protected," and uncertain protections are little better than none at all. Jaffee v. Redmond, 116 S. Ct. at 1932. As the Court noted, protecting the privacy of these communications will not cause the loss of otherwise available information because the communications will not occur if privacy is not protected. 116 S. Ct. at 1929.

A balancing test is inappropriate under the facts of this case because it is unlikely that the patients would have obtained effective psychotherapy, or any treatment at all, had they known that disclosure of their psychiatric records could be compelled as a result of a baseless allegation by a hostile party.

IV. The MSBP's Interest Does Not Override the Patients' Right to Privacy Even Under the Balancing Test

After conceding that its policy compels the production of the entire mental health record in every case, the MSBP decision sets forth, in dicta, a perfunctory analysis of the factors in Dr. K. to justify the application of its policy in this case. E. 13-22. As the ALJ concluded (E. 212-217), the MPSB's interest does not outweigh the patients' rights to privacy even under those factors.

A. Type of Record and Information

The MSBP concedes that the psychiatric records at issue were of an "intensely personal and extremely delicate nature." E. 13. The patients were understandably terrified by the complaint filed with the MSBP by the estranged husband of Patient A because it was clearly designed to produce information that could be used in separating them from each other. E. 213.

The MSBP'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. Board of Physician Quality Assurance, 85 F. Supp. 2d 545 (D. Md. 1999), and "not unlike" the mental health counseling records sought in Doe v. Maryland Board of Social Work Examiners, 384 Md. 161 (2004). E. 14. The information that was the target of the MSBP's demand in this case, and the circumstances out of which it arose, bear little resemblance to these cases.

In fact, the information was far more sensitive and potentially damaging than that requested in Dr. K. which, at most, was likely to be embarrassing to a patient who admittedly had been involved in an affair with her psychotherapist and participated in the admitted violation of standards of medical ethics. 632 A.2d at 459. The social work treatment records at issue in the majority opinion in Doe were the records of an individual who had been convicted of child abuse and who collaborated with the social worker (who had also admitted to violating a state law requiring disclosure of evidence of child abuse) to prevent an investigation into whether further sanctions were appropriate. 384 Md. at 166-167, 862 A. 2d at 998-999.

The psychiatric records at issue in this case, by contrast, were for a mother and her two minor children who were not suspected of any crime and had not participated in the violation of any principle of ethics. No one was seeking to block an investigation but

rather to allow the investigation to take place without abrogating the patients' rights to privacy and the psychotherapist's professional ethics.[4]

As even the MSBP's decision acknowledges, the records at issue in Patients of Dr. Solomon were "non-psychiatric treatment and billing records." E. 14. Accordingly, the privacy of those records was not as essential for quality health care as is the privacy of the psychiatric records in this case.

Further, the court in Patients of Dr. Solomon relied extensively on the holding in Ferguson v. City of Charleston, 186 F.3d 469, 482 (4th Cir. 1999), for the proposition that "courts permit the intrusion into the zone of privacy surrounding medical records where the societal interest in disclosure outweighs the individual's privacy interest," and the government "has a compelling interest in identification of law breakers and deterring future misconduct." Patients of Dr. Solomon, 85 F. Supp. 2d at 547-48, citing Ferguson, 186 F.3d at 483. That court could not know in rendering its decision in 1999 that the Supreme Court in 2001 would reverse the Fourth Circuit's decision based on a finding that "[t]he reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent." Ferguson v. City of Charleston, 532 U.S. 67, 78, 121 S. Ct. 1281, 1288 (2001). The Supreme Court further noted that it had decided no prior case where there was an intrusion on that kind of expectation. 121 S. Ct. at 1289.

Upon remand, the Court of Appeals for the Fourth Circuit ruled again in favor of the patients' right to privacy by holding that any consent to disclose personal health information had to be "informed" consent in that the patients "are to be fully informed of their constitutional rights". Ferguson v. City of Charleston, 308 F.3d 380 (4th Cir. 2002). The court in Doe relied on the decision in Patients of Solomon apparently unaware that the Fourth Circuit's decision, on which it was based, had been reversed three years earlier. 862 A.2d at 1010.

[4] One court has noted, "[t]he weight of authority in other jurisdictions supports 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] In re Berg, 152 N.H. 658, 665, 886 A. 2d 980, 986-987 (N.H. 2005).

Patients A, B, and C in this case were law abiding citizens who clearly had a "reasonable expectation" that the confidential communications with their psychiatrist would not be disclosed without their informed consent. They never gave consent, voluntary or otherwise, for the disclosure of their mental health records. E. 12. The MSBP convinced their attorneys that further efforts to assert their right to privacy would be futile, and it coerced Dr. Eist to disclose the records over the patients' objections. E. 11-12. Thus, the MSBP's policy ensured that the patients would not be allowed to exercise their constitutional right to privacy.

The United States Court of Appeals for the Ninth Circuit recently concluded that a state statutory and regulatory licensure scheme violated the Due Process Clause of the 14th Amendment by allowing access by state workers to unredacted medical records of health facilities. Tucson Woman's Clinic v. Eden, 371 F.3d 1173, 1193-94 (9th Cir. 2004). The "extremely broad" range of the information that was accessible from abortion clinics under this regulatory scheme was one of the factors that rendered it unconstitutional. The court reached the following conclusion: "Finally, while the public interest involved—promoting health and safety—is of course a strong one, we fail to see how insisting on the unredacted materials promotes this need. We therefore hold that the regulation giving DHS unbounded access to unredacted patient records violates the informational privacy of patients." 371 F.3d at 1195.

The information demanded by the MSBP in this case was at least as sensitive and as unlimited in scope as the information demanded in the unconstitutional regulatory scheme in Tucson Woman's Clinic. As shown, a "less intrusive" approach tailored to the circumstances of this case should have been used in order for the board to discharge its duties in a constitutionally valid manner.

B. The Potential For Harm in Subsequent Nonconsensual Disclosures

The MSBP's analysis of this criterion, perhaps better than any other, reflects its disregard for rights and concerns of the patients. It acknowledged that "Patients A, B,

and C could possibly be embarrassed by the board viewing their records", but states that "[p]resumably, patients are grateful that their care is reviewed for quality by competent professionals in the field." E. 15 (emphasis added).

This statement ignores the fact the patients opposed the disclosure of their psychiatric records because they feared disclosure could jeopardize their family unity. Accordingly, it is unlikely that they were "grateful" to the MSBP for exposing them to this threat.

In addition, the MSBP's decision does not address the potential for harm due to a subsequent non-consensual disclosure of these records to the public. As the court in Dr. K. noted, "[t]he consequences of nonconsensual public disclosure of psychiatric records might well be harmful." 98 A.2d at 459. The ALJ found that "the possible harm is obvious" in view of the unstable situation in the family. E. 213.

C. The Injury in Disclosure to the Relationship for Which the Record Was Generated

The MSBP finds it "almost impossible to predict the impact, if any" of its compelled disclosure of the patients' mental health records in response to the complaint filed by the estranged husband. E. 17. However, the ALJ easily predicted the adverse impact of the MSBP's action particularly in view of the fact that the treatment relationship with the patients was ongoing at the time of the demand for their records. E. 213. The ALJ found:

> The potential for harm to the relationship certainly exists, especially since Patient A vehemently opposed the disclosure of her records. The Patients feared that the Complainant might somehow be privy to information disclosed to the Board, since he was the person who filed the complaint. (Tr. p. 594). The mere possibility of disclosure is sufficient to damage an ongoing psychiatrist/patient relationship if a patient is no longer confident that his or her treatment information will remain confidential.

E. 213. The ALJ's findings are completely consistent with the Supreme Court's observation in Jaffee v. Redmond that unauthorized disclosures of communications would have a chilling effect on further conversations with psychotherapists. 518 U.S. at 12, 116 S. Ct. at 1929. It is curious that the ALJ was aware of the Supreme Court's findings in Jaffee (E. 220) while the MSBP seemed to be ignorant of them. By contrast, the court in Dr. K found it significant in allowing a disclosure of psychiatric records that the treatment relationship with the patient had ended long before the documents were subpoenaed. 98 Md. App. at 116, 632 A. 2d at 460.

To appreciate the adverse effect of the MSBP's policy on the therapist-patient relationship, consider the Miranda-like warning an ethical psychotherapist would have to give a patient under that policy.[5]

> 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.

Such a warning would surely damage the therapeutic relationship.

The fact that Patient A expressed continued support for Dr. Eist after learning of the subpoena (E. 17) is likely due to Dr. Eist's competence as a psychotherapist and his willingness to adhere to his ethical standards and not produce Patient A's confidential information over her objection. In any event, this does not prove that the relationship did not suffer injury as a result of the MSBP's action.

---

[5] The ethical therapist must disclose to the patient the "relevant limits on confidentiality" at the beginning of the therapeutic relationship. Jaffee v. Redmond, 518 U.S. at 13, 116 S. Ct. at 1930, n. 12.

D. Adequacy of Safeguards to Prevent Unauthorized Disclosures

There is no way for the patients or their psychiatrist to know if the safeguards used by the MSBP were adequate to prevent unauthorized disclosure. There is no evidence in the board's decision that it ever informed the patients or Dr. Eist of those security measures. There is further no evidence the board required redaction or encryption of identifiable information while the records were being handled by the board staff. Because of the highly sensitive nature of the information and the devastating consequences of its unauthorized disclosure, the patients were justifiably quite concerned.

There was evidence that the MSBP has inadvertently disclosed confidential health information in the past and that Patient A was fearful that her information or that of her children would be disclosed. E. 214.

Further, it is likely that at least Patient A was aware that security breaches of confidential health information occur on a nearly daily basis. The United States Department of Health and Human Services has noted many such examples including the following:

- "An employee of the Tampa, Florida, health department took a computer disk containing the names of 4000 people who had tested positive for HIV, the virus that causes AIDS." USA Today, (Oct. 10, 1996).
- "A candidate for Congress nearly saw her campaign derailed when newspapers published the fact that she had sought psychiatric treatment after a suicide attempt." New York Times (Oct. 10, 1992).
- "A 30-year old FBI veteran was put on administrative leave when, without his permission, his pharmacy released information about his treatment for depression." Los Angeles Times (Sept. 1, 1998).

65 Fed. Reg. at 82,467. Frequent reports in the media of health information breaches show that Patient A's fears were justified.[6] So the patients in this case rationally could

[6] See http://www.healthprivacy.org/usr_doc/privacystories.pdf

have been concerned that the privacy of their highly sensitive psychiatric information might not be kept secure.

E. The Government's Need for Access

The MSBP's decision takes the position that it must compel disclosure of the entire mental health record in all cases involving psychiatric quality of care and that it would be "particularly inappropriate" to use alternative methods. E. 19. This position is contrary to the holding in Westinghouse that, in applying the balancing test criteria, "[w]e cannot assume that an [individual's] claim of privacy as to particular sensitive data in that [individual's] file will always be outweighed by [the government's] need for such material." United States v. Westinghouse, 638 F.2d at 581.

In Dr. K., the court determined that a lack of access to the psychiatric record of a patient who allegedly had a romantic involvement with a psychiatrist while undergoing psychotherapy "foreclose[d] any meaningful investigation into that conduct and any basis for disciplinary action." 632 A.2d at 461. That court did not conclude, as the MSBP's decision does here, that full disclosure of the entire psychiatric record is necessary, as a preliminary matter, in all psychiatric quality of care cases, regardless of the circumstances. The MSBP has simply failed to show why less intrusive alternatives tailored to the needs of this case could not have been adopted.

F. Express Statutory Mandate, Articulated Public Policy, or Other Public Interest

The MSBP decision states that its absolutist policy must be upheld because the statute, Md. Health Gen. Code Ann. 4-307(k)(1), requires all health care providers to produce medical records "without the authorization" of the patient to "professional licensing and disciplinary boards " who subpoena records for the purpose of investigating the provider. E. 22. However, the MSBP decision does not cite any provision of the statute that authorizes the board to compel disclosure of the entire medical record in every preliminary investigation without regard for the constitutionally protected privacy

rights of the patients. The MSBP's position, in other words, is that they override the patients' right to privacy in every case, not because it is necessary, but because they believe they can. If this were the meaning and intent of the statute, then there would be no reason for "[a] weighing of all the factors" in Dr. K. v. State Board of Physician Quality Assurance, 632 A.2d at 462. Indeed, one would need only to look at a single factor—whether some statutory authority exists.

The course of conduct taken by Dr. Eist in this case was not only more reasonable than that of the MSBP, it was the approach that is consistent with constitutional law and medical ethics. Once the board was alerted by Dr. Eist to the particularly sensitive nature of the psychiatric information demanded by the subpoena and the patients' objections, the board could have, and should have, worked with Dr. Eist to tailor its request or use less intrusive alternatives to reach the determination that there was never any problem with the quality of the care being provided. Rather than taking a course of action that was in the best interest of effective and ethical psychiatric care, the MSBP rotely applied its policy of automatic compelled disclosure in violation of the patients' constitutional rights to privacy.

V. Dr. Eist Acted in Good Faith and on Advice of Counsel

In order to determine that Dr. Eist acted in good faith, one need only review the observation of the Circuit Court at the end of the August 15, 2003 hearing in which it summarized the good faith issue as whether Dr. Eist acted on the "good-faith belief that [he] had the right to withhold the documents, particularly on the advice of counsel, as it appears that the doctor acted in this case…". E.176. (emphasis supplied).

The MSBP's own findings show that Dr. Eist sought the advice of experienced counsel, engaged the attorney to give that advice and represent his position to the MSBP, and followed that advice. MSBP's Dec., Findings of Fact at 10, 11, 10 [duplicate numbering], 17, and 23, E. 11-12. See also, ALJ's decision at E. 219. In deciding to impose a "relatively minor" sanction, the MSBP acknowledged that "Dr. Eist did at least call an attorney, and…was given some advice." E. 28.

To support its contention that, even in the face of the above concessions, Dr. Eist did not act in good faith, the MSBP states that (a) the attorney was "private counsel," (b) whom Dr. Eist consulted only "over the phone," and (c) was never paid for his advice. E. 27. It is difficult to comprehend the significance of the first point since most attorneys engaged by individuals to give them legal advice are "private." It is also difficult to grasp the significance of the second point since many lawyers today provide advice to clients over the telephone and never actually meet them face-to-face. And the third point reflects a basic misunderstanding of law: a lawyer need not be paid to be his client's counsel.

It is clear under Maryland law that an attorney-client relationship existed between Dr. Eist and the counsel he consulted. A "client" of a lawyer "includes one who is either 'rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.'" Attorney Grievance Commission of Maryland v. Brooke, 374 Md. 155, 821 A.2d 414, 424 (2003). The MSBP's own findings demonstrate that Dr. Eist was a "client."

With respect to payment, established law in Maryland provides as follows:

> Although an agreement upon the amount of a retainer and its payment is rather conclusive evidence of the establishment of the attorney-client relationship, the absence of such an agreement or payment does not indicate conclusively that no such relationship exists. Indeed, the payment of fees is not a necessary element in the relationship of attorney and client. The services of an attorney to the client may be rendered gratuitously but the relationship of attorney and client nonetheless exists."

Id (emphasis supplied); see also, Attorney Grievance Commission of Maryland v. James, 355 Md. 465, 735 A.2d 1027, 1033 (1999); Attorney Grievance Commission v. Shaw, 354 Md. 636, 732 A.2d 876, 883 (1999).

The attorney-client relationship exists when "(1) a person seeks advice or assistance from an attorney; (2) the advice or assistance sought pertains to matters within the attorney's professional competence; and (3) the attorney expressly or impliedly

agrees to give or actually gives the desired advice or assistance." Atty. Grievance Com'n v. Brooke, 821 A.2d at 424. As reflected in the MSBP's own findings, Dr. Eist sought advice or assistance from the attorney, the advice or assistance was within the attorney's professional competence as counsel for the Washington Psychiatric Society, and the attorney actually gave Dr. Eist advice and assistance. E. 11. So there can be no doubt that an attorney-client relationship existed between Dr. Eist and the attorney.

Finally, the MSBP contends that even if Dr. Eist relied upon the advice of experienced counsel, he cannot have acted in good faith because the MSBP believes the counsel's advice was incorrect and because counsel changed his advice—once the board issued its charge of failure to cooperate. E. 24-25. Of course, whether the counsel's advice was incorrect does not detract from Dr. Eist's good faith reliance on it; and that is especially so because the advice was at least objectively reasonable (even if, *arguendo*, it was "incorrect"). The MSBP concedes as much by stating, "Dr. Eist is entitled to raise that issue no matter how incorrect or inconsistent his legal advice was." E. 25. In any event, Amici believe counsel for Dr. Eist, rather than the MSBP, correctly interpreted controlling law.

Further evidence of Dr. Eist's good faith reliance upon advice of counsel is that two ALJ decisions and two Circuit Court decisions have essentially agreed with the advice Dr. Eist received and the actions he took.

Also, the evidence shows that Dr. Eist continued to follow the advice of counsel even when he proposed a process for resolving the matter by giving the patients notice that their information would be disclosed unless they intervened. E. 12.[7] At no time did Dr. Eist act in disregard of the law or advice of counsel.

None of the cases cited by the MSBP decision are analogous to the facts in this case. Dr. Eist did not "ignore compulsory process" as in Melvin J. Duckett, M.D., Bd. Dec. No. 1996-0850 (1998), but rather responded to the board's subpoena within one day

[7] It is noteworthy that this is precisely the alternative chosen by the court in Westinghouse, 638 F.2d at 581, the case that forms the basis for the balancing test in Dr. K.

of receiving it and continuously communicated with the board seeking to reconcile his patients' constitutional rights and his ethical obligations with the board's demands.

There was no "disregard for...cooperation" as in Paul A. Mullan, M.D., Bd. Dec. No. 2000-0785 (2002). Dr. Eist manifested his willingness to cooperate in the investigation from the very beginning. Nor is this case similar to Solomon v. State Bd. Of Phys, Qual. Assur., 155 Md. App. 687 (2003) because it does not involve a physician who steadfastly refused to respond to numerous administrative subpoenas over a number of years. Dr. Eist was immediately and continuously responsive to the board's demands and sought to accommodate them in a way that would not violate his ethical obligations to his patients.

The definition of "good faith" is well established under Maryland case law:

> "Good faith" is an intangible and abstract quality that encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage. *Black's Law Dictionary* 623 (5th ed. 1979). To further illuminate the definition of "good faith," we found it most instructive to compare the definition of "bad faith." "Bad faith" is the opposite of good faith; it is not simply bad judgment or negligence, but it implies a dishonest purpose or some moral obliquity and a conscious doing of wrong. Though an indefinite term, "bad faith" differs from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with a furtive design. Thus, we would infer that the definition of "good faith" ...means with an honest intention.

Bond v. Messerman, 162 Md. App. 93, 119-20, 873 A.2d 417, 432 (2005); see also, Laws v. Thompson, 78 Md. App. 665, 678, 554 A.2d 1264, 1271 (1989). The record in this case shows that Dr. Eist had an honest belief that he was acting in accordance with the law, his medical ethics and the vital interests of his patients. There is no evidence that he had a dishonest purpose, some moral obliquity, or was conscious of doing wrong. Dr Eist surely did not have a "furtive design" in refusing to disclose his patients' records. He said from the beginning that the complaint against him was false (E. 10), and that proved

to be true upon peer review. (E. 12). Actually, it was in Dr. Eist's interest to disclose the records as soon as possible, but admirably, he sought to protect his patients' rights and interests in accordance with his standards of medical ethics. Accordingly, Dr. Eist consistently acted with "an honest intention."

The MSBP also argues that, even if there is evidence that Dr. Eist acted in good faith on advice of counsel, the statute does not require the board to show that he acted in bad faith. E. 24. However, this is precisely the issue that the Circuit Court directed the MSBP to address based on the fact that "it appear[ed]" that Dr. Eist had acted in good faith. In other words, the MSBP was given another opportunity to rebut the Court's conclusion. This it has not done. In fact, the MSBP's argument is undermined by its statement that "the Board understands fully that the Administrative Prosecutor has the burden of proof." E. 29. Amici agree and believe that burden of proof has not been met in this case.

VI. Conclusion

The contrast in the parties' positions could hardly be more vivid. The MSBP believes it has the right in every case to override the patients' constitutional rights to medical privacy and the practitioner's established standards of medical ethics without considering the sensitivity of the information, the wishes of the patients or the damage that such compelled disclosures would do to quality health care. Dr. Eist believes he acted reasonably in responding immediately to the MSBP's demands and offering to cooperate to permit the investigation to proceed in a manner that would not harm his patients' rights to privacy or their access to quality health care.

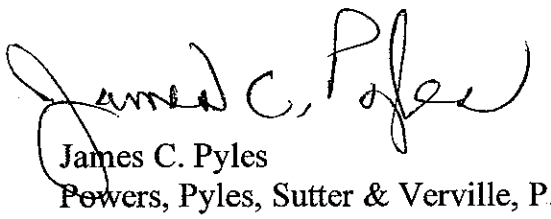
It is the view of the Amici that the position taken by Dr. Eist in this case is more reasonable and consistent with established principles of constitutional law and medical ethics and more consistent with the board's mission. That belief has now been supported by the consistent rulings in two ALJ decisions and two Circuit Court proceedings. If patients do not have a constitutionally protected right to privacy for their inner-most thoughts, emotions and fears, it is difficult to imagine that they have a right to privacy for

any information. The right to medical privacy is more than an abstract principle—it is an essential requirement for quality health care and the ethical practice of medicine.

The board's sanction of Dr. Eist should be reversed even if the Court were to find that the MSBP's absolutist policy is not violative of the constitutional right to mental health privacy. Dr. Eist's response to the MSBP's subpoena clearly was in good faith—it was also objectively, *one* reasonable course of action—and that is itself sufficient to preclude sanction.

The decision by Judge Thompson reversing the MSBP's decision and dismissing all charges against Dr. Eist should be affirmed. E. 33-34.

Respectfully submitted,



James C. Pyles
Powers, Pyles, Sutter & Verville, P.C.
1875 Eye Street
Washington, D.C. 20006
(202) 466-6550
jim.pyles @ ppsv.com

Counsel for Amici Curiae

October 20, 2006

ADDENDUM

Amici Curiae

A. 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, and Fairfax 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 and is acutely concerned with ensuring that the licensure laws for psychotherapy in Maryland and the region are applied in a manner that is consistent with constitutional law and medical ethics.

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 Association for Social Psychiatry

The American Association for Social Psychiatry was founded in 1971 by American Psychiatrists who focused attention on the social aspects of the biopsychosocial model. The AASP continues to address issues pertaining to the practice of psychiatry and obstacles that prevent patients from receiving needed psychiatric treatment. The covenant of confidentiality in the doctor-patient relationship is crucial to quality psychiatric treatment and must not be breached. AASP believes that this relationship is jeopardized by the Board's action in this case.

D. 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.

E. American Psychoanalytic Association

The American Psychoanalytic Association is one of the oldest mental health practitioner 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. One of its core ethical principles is the psychotherapist-patient communications not be disclosed without the patient's informed consent. That ethical standard is threatened by the Board's ruling in this case.

F. American Academy of Psychoanalysis and Psychodynamic Psychiatry

The American Academy of Psychoanalysis and Psychodynamic Psychiatry is an organization of approximately 600 psychiatrists with expertise in psychoanalysis and psychodynamic psychiatry. The organization is national in scope. Throughout its 50 year history, the Academy has been strongly interested in protecting the right of patients to the confidentiality and privacy of their medical records. As physicians and as an Allied Organization of the American Psychiatric Association, their members hold medical ethics in the highest regard. The Academy supports the actions of Harold I. Eist, M.D. with respect to safeguarding his patients' confidentiality and supports the amicus brief in this case.

G. Association of American Physicians & Surgeons, Inc.

The Association of American Physicians & Surgeons, Inc. ("AAPS") is a nationwide organization of thousands of physicians founded in 1943. Their members include physicians in all specialties and states, including Maryland. They are dedicated to preserving the integrity of the patient-physician relationship. They frequently file *amicus curiae* briefs before state and federal courts in defense of the practice of private and ethical medicine, and are often successful. *See, e.g., United States v. Dr. William Hurwitz*, 459 F.3d 463 (4th Cir. 2006) (overturning a conviction of a physician who treated pain); *United States v. Dr. Jeffrey Rutgard*, 116 F.3d 1270 (9th Cir. 1997) (overturning an unjust sentence of a physician based on billing). AAPS sued and

defeated the Food and Drug Administration in *Ass'n of Am., Physicians & Surgeons, Inc. v. United States F.D.A.*, 226 F. Supp. 2d 204 (D.D.C. 2002).

AAPS has a particularly strong interest in privacy issues, like those presented in this case. The federal government even cited a report by AAPS in connection with the promulgation of the Privacy Rule in 2000. 65 Fed. Reg. 82462, 82468 (Dec. 28, 2000). Many AAPS physicians are very concerned about interference with the patient-physician relationship. The violation of patient privacy, like that attempted by the Maryland State Board of Physicians here, would greatly chill the practice of medicine by AAPS physicians and others.

H. 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.

I. Child and Adolescent Psychiatric Society of Greater Washington

The Child and Adolescent Psychiatric Society of Greater Washington is a regional organization of the American Academy of Child and Adolescent Psychiatry. This is a medical specialty organization representing approximately 250 Child and Adolescent Psychiatrists in the National Capital Area with members practicing in the District of

Columbia, Suburban Maryland, and Northern Virginia. The CAPSGW is concerned about the adverse effect of the Board's ruling on child and adolescent psychiatry.

J. Delmarva Psychiatry Group, Inc.

The Delmarva Psychiatry Group, Inc. is a group of psychiatrists who practice psychiatry on the Eastern Shore of Maryland who are quite concerned that the Maryland State Board of Physicians' policy requiring full disclosure of any psychiatric patient's mental health record as a first step in investigating any complaint, even over the patient's reasonable objection, will undermine the ability of psychiatrists in the State of Maryland to furnish effective psychiatric services. Such a policy is also in conflict with the standards for the ethical practice of psychiatry.

K. JustHealth

JustHealth is a membership organization of health care consumers from throughout the United States that seeks to create a just health system by:

1) Educating the public about the current state of the health care system;

2) Taking action to protect consumers and providers from dangerous, deceptive, dishonest, unfair or unlawful acts and practices;

3) Proposing and supporting legislation and regulations that will foster a just health care system; and

4) Being an advocate for consumers and providers in every available forum.

JustHealth's interest in Maryland Board of Physicians v. Eist, No. 00329, Court of Special Appeals, Maryland arises from the importance of maintaining the confidentiality of personal health information provided to any health care provider. JustHealth has observed that: 1) consumers expect and believe that personal, sensitive information that

they disclose to their health care provider will not be given to anyone else without their prior consent; 2) if informed that this information will be disclosed to third parties without their consent, consumers will often not seek necessary care or will fail to disclose all information that might be required for a practitioner to make a correct determination of the condition and appropriate course of treatment; and 3) this lack of control over their personal health information, seriously erodes the relationship of trust and confidence between the patient and provider that is essential for good care. The decision in Eist is, in JustHealth's view, antithetical to a just health care system, the creation of which is JustHealth's reason for being.

L. 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.

M. Maryland State Medical Society

MedChi, the Maryland State Medical Society, is the organization of Maryland physicians that represents the interests of the over 20,000 licensed physicians in Maryland. MedChi, formally known as The Medical and Chirurgical Faculty of

Maryland, was founded in 1799 by an act of the Maryland General Assembly with the purpose of "prevent[ing] the citizens [of Maryland] from risking their lives in the hands of ignorant practitioners or pretenders to the healing art." Today, its mission statement charges it with serving "as Maryland's foremost advocate and resource for physicians, their patients and the public health."

MedChi's interest in this case stems from that mission. MedChi believes that the interests of physicians, patients, and public health are not served by the continuation of the case against Dr. Eist. The confidentiality of patient information has been an ethical principle of all the healing professions since ancient times. MedChi has long been a foremost proponent of that principle. In 1998, MedChi established a task force on Medical Records Privacy and Confidentiality that made a series of recommendations for the enhancement of confidentiality protections, a number of which became the basis for subsequent legislative enactments.

MedChi handles dozens of inquiries from both health care professionals and patients every month regarding the confidentiality obligations of physicians and recognizes the need for clear and accurate guidance in these matters from the profession, the legislature, and the judiciary.

N. Massachusetts Psychiatric Society

The Massachusetts Psychiatric Society represents 1700 psychiatrists in Massachusetts. MPS members are physicians who are committed to providing outstanding medical/psychiatric care through accurate diagnosis and comprehensive treatment of mental health and emotional illnesses. They seek to achieve this goal by

promoting public and professional education, legislation that addresses the needs and rights of the mentally and emotionally ill, and by advocating for the allocation of public and private resources for treatment, research, and education.

Patient privacy is the cornerstone of psychiatric care. Patients must be able to feel that the highly sensitive information they confide to us will remain confidential. The Supreme Court, in Jaffee v. Redmond, recognized this in confirming that the information passed between a therapist and a patient is protected by legal privilege. MPS believes that the actions of the licensing Board in this case violate the privacy rights of patients.

O. Mississippi Psychiatric Association

The Mississippi Psychiatric Association is a district branch of the American Psychiatric Association and a State association based in Jackson, Mississippi. MPA has approximately 195 members and represents 75% of the psychiatrists in the State of Mississippi. The confidentiality of medical records and the privilege of the patient to choose to whom their confidential information is released is the cornerstone of the doctor-patient relationship. We believe that the actions of the Board in this case are detrimental to this crucial relationship.

P. National Alliance of the Mentally Ill-Delaware

The National Alliance for the Mentally Ill-Delaware is the state chapter of a grassroots organization whose membership exceeds 250,000 people. Their mission is to support education and advocate until there is a cure for mental illnesses. The patient-doctor relationship is the cornerstone of good medical care, and this is particularly in the practice of psychiatry. The doctor's assurance to the patient that confidentiality will not

be broken unless the patient explicitly consents is a very important component of trust which enhances the treatment experience for that patient. NAMI-DE believes that the psychiatrist in this case has demonstrated the highest loyalty to his oath as the patient's advocate and that this translates into the highest ethics of medicine.

Q. National Association of Social Workers and the National Association of Social Workers, Maryland Chapter

With 149,000 members, the National Association of Social Workers ("NASW") is the largest organization of professional social workers in the world. The Maryland Chapter of NASW represents over 4000 members in the state of Maryland. Created in 1955 by the merger of seven predecessor social work organizations, the purposes of NASW include improving the quality and effectiveness of social work practice in the United States and developing and disseminating high standards of social work practice, concomitant with the strengthening and unification of the social work profession as a whole.

In furtherance of these purposes, NASW promulgates professional standards and Criteria. Additionally, NASW 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. NASW also offers a credentialing program to enhance the professional standing of social workers. The credentials offered include the NASW Diplomate in Clinical Social Work and the Qualified Clinical Social Worker credential.

NASW's members are highly trained and experienced professionals who counsel individuals, families, and communities in a variety of settings, including schools, hospitals, mental health clinics, senior centers, and private practices.

NASW's policy statement, *Confidentiality and Information Utilization*, indicates that social workers should be guided by the principle that "[c]lients' informed and authorized consent will be a prerequisite to transmitting information to or requesting it from third parties." NASW, SOCIAL WORK SPEAKS 61, 65 (2006).

Accordingly, given NASW's policies and the work of its members, NASW has expertise that will assist the Court in reaching a proper resolution of the questions presented in this case.

R. 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. NCMHPC works to remove barriers to access to quality mental health and substance abuse care such as the loss of health information privacy. NCMHPC has members who reside in 41 states, including the State of Maryland. NCMHPC believes that the policy of the Board in this case is detrimental to the quality and availability of mental health treatment.

S. New Jersey Psychiatric Association

The New Jersey Psychiatric Association recognizes that the principles at stake

critical to the best interests of our patients and the right of consent must not be overridden by state agencies or others without legal standing. It is also our opinion that his actions in this case were in compliance with the highest principles of medical ethics.

T. Oklahoma Psychiatric Physicians' Association

The Oklahoma Psychiatric Physicians Association is a membership organization that has more than 250 member psychiatrists who practice in the State of Oklahoma. Part of the Association's mission is to promote, protect and preserve the ethical practice of psychiatry. The Association believes that the position taken by the Maryland State Board of Physicians in compelling the disclosure of the entire psychiatric record of patients whenever a complaint is filed even by a non-patient violates the ethics standards that are applicable generally to the practice of psychiatry. The Association joins the amicus curiae brief to oppose the board's policy in order to ensure that such a policy does not spread to Oklahoma.

U. Patient Privacy Rights

Patient Privacy Rights is a national consumer educational and advocacy foundation based in Austin, Texas. The mission of Patient Privacy Rights is to educate and empower Americans to preserve and protect their human rights to medical privacy. The organization is concerned that the Board's policy in this cases poses a severe threat to health information privacy. Patient Privacy Rights believes that allowing a medical licensing board to compel the disclosure of patient medical records over the express objections of the patient to serve the interests of the Board is an extremely dangerous precedent.

V. Program in Psychiatry and the Law, Beth Israel Deaconess Medicare Center, Harvard Medical School

From its inception 25 years ago, the Program in Psychiatry and the Law, Beth Israel Deaconess Medical Center, Harvard Medical School, has discussed, lectured, studied, consulted on and proposed a number of issues at the interface of law and psychiatry. Confidentiality and privacy have been among those issues. Members of the Program itself have lectured and been consulted widely on the central matters in Maryland State Board of Physicians v. Eist, No. 00329, Court of Special Appeals of Maryland. The brief as stated reflects our understanding of the founding and guiding values of our Program. Based on our history as a Program and our personal beliefs, we agree with the present signatories on the brief and join them in their intentions.

W. Psychiatric Society of Delaware

The Psychiatric Society of Delaware is a membership organization with approximately ninety psychiatrists representing over eighty percent of the licensed psychiatrists in the State. The organization's mission includes advocacy, education and maintenance of ethical standards for the profession. The patient-doctor relationship is the cornerstone of good medical care, and this is particularly true in the practice of psychiatry. The assurance of confidentiality dates back centuries to the time of Hippocrates, and it is just as relevant today. The Psychiatric Society of Delaware believes that Dr. Eist has exhibited courage and devotion to the highest standards of medical ethics and has an interest in ensuring that the Court reach the same conclusion.

X. Psychiatric Society of Virginia

The Psychiatric Society of Virginia is a district branch of the American Psychiatric Association, with over 500 member psychiatrists. The Society focuses on service to the community and advocacy of mental health issues (including access, privacy, confidentiality, quality, and ethical concerns related to psychiatric care in the Commonwealth of Virginia). Failure to preserve patients' privacy and confidentiality rights will severely undermine our mission, and further limit access to care. Patients and potential patients are often already reluctant to pursue needed mental health care, and a threat to their privacy and confidentiality will cause some patients not to pursue or continue needed evaluation and treatment, and/or not to be fully forthcoming in the therapy setting; which is essential for successful treatment.

Y. Psychoanalytic Institute of New England, East (PINE)

The Psychoanalytic Society of New England, East (PSNE) is a professional organization of 83 highly trained mental health professionals, including physicians, psychologists, and social workers. The Society was founded in 1991 and continues to provide high quality education for the purpose of treating a wide variety of mental illnesses.

This case is of vital interest to PSNE because privacy is the cornerstone of the ability its members to do their work. Without the assurance of privacy, patients would not be able to trust members and would not be able to confide highly confidential and personal information that is vital to their recovery. The idea that a medical board, or any

third party, could access patient information without the patient's consent, would be very destructive to our members' ability to deliver quality psychiatric care.

Z. Suburban Maryland Psychiatric Society

The Suburban Maryland Psychiatric Society is a member organization with approximately 500 psychiatrists in the state of Maryland as members. The Society recognizes that the principles of confidentiality and the right of consent involved in the Maryland Board of Physicians v. Eist case are critical to the best interests of our patients. The right of patient consent must not be overridden by state agencies. The Suburban Maryland Psychiatric Association wishes to go on record in support of Dr. Harold Eist's actions in this case. We believe he behaved in a fashion that upheld the highest standards of clinical practice and medical ethics.

AA. Vermont Psychiatric Association

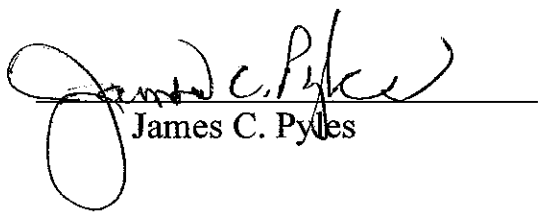
The Vermont Psychiatric Association's mission is to serve the public by strengthening its physician members' individual and collective resolve, as well as their efforts to improve the quality of life for the people of Vermont by appropriate health services. Safeguarding the doctor-patient relationship is crucial to the delivery of psychiatric care. Confidentiality should not be breached without patient consent; it is the cornerstone of the doctor-patient relationship. The MSBP's policy in this case appears to violate that core principle.

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 Appellant and the Appellee at the addresses listed below.

Thomas W. Keech
Assistant Attorney General
300 West Preston Street, Suite 302
Baltimore, Maryland 21201

Alfred F. Belcuore
Montedonico, Belcuore & Tazzara, P.C.
1020 Nineteenth Street, N.W., Suite 420
Washington, D.C. 20036



James C. Pyles

October 20, 2006