To: Interested Parties

From: Jim Pyles
Counsel for Amici Curiae

Re: Favorable decision in Maryland State Board of Physicians v. Eist

Date: September 16, 2007

It is my great pleasure to report that the Maryland Court of Special Appeals has issued a unanimous 55-page decision fully in favor of Dr. Eist and the patients' constitutional right to health information privacy in Maryland State Board of Physicians v. Harold I. Eist, M.D., No. 329 (September 13, 2007). While the amicus curiae brief is not expressly cited (nor were the briefs of the parties), the Court adopts the constitutional arguments set forth in that brief. Congratulations are certainly in order to Dr. Eist for his perseverance in defending his patients' constitutional right to privacy and the ethics standards of his profession as well as to Dr. Eist's counsel for his thorough and detailed presentation of the evidence and legal arguments in the case. Congratulations are also in order for the 28 state and national mental health practitioner and patient associations who signed on to the amicus curiae brief. A list of those organizations is attached.

The Issue in the Case

The issue in the case was essentially whether a psychiatrist acted lawfully when he heeded the wishes of his patients and his standards of professional ethics and refused to disclose their psychiatric records to a state licensing board in response to a subpoena based on a complaint filed by a non-patient relative. More generally, the issue was whether a state licensing board can ignore the patient's right to health information privacy protected by the federal constitution and compel the disclosure of confidential health information over the patient's objection and regardless of the patient's privacy interest.

The Court's Holding

The Court of Special Appeals held that Dr. Eist properly refused to immediately disclose the psychiatric records of three of his patients over their objections in response to a subpoena from the Maryland State Board of Physicians. According to the Court, the burden was on the Board to show that it had a compelling interest in disclosure of the records that overrode the patients' constitutionally protected privacy interest by applying certain criteria set forth in a 1980 federal Court of Appeals decision by the name of *United States v. Westinghouse* (referred to in the decision as the *Westinghouse* factors). The Board failed to sustain that burden because it assumed its statutory right to

obtain the health information without patient consent automatically outweighed the patients' right to privacy in every case. Because the Board failed to sustain its burden, Dr. Eist did not act in "bad faith" when he initially did not disclose the records in response to the subpoena.

The crux of the Court's decision is set forth in the following excerpts:

1. "...when a patient invokes his right to privacy in his medical records, it is the investigating agency's burden, as an instrumentality of the state, to show that its statutorily recognized interest in obtaining the records is a compelling one that outweighs the patient's privacy rights in those same records, using the *Westinghouse* factors as an analytical framework....this balancing analysis is the proper method to assess the constitutional significance of the underlying facts, and therefore is a question of law to be decided *de novo* by a reviewing court." Decision at p. 36-37.

2. "It was established Maryland law at that time, and remains today, that individuals have a federal constitutional privacy right in keeping information in their medial records private from the government. To be sure, the Board was statutorily entitled to obtain the records in question without the consent of the patients. Because the patients made a privacy challenge to the disclosure of their records, however, the Board's ultimate right to obtain the records depended upon whether its interest in ascertaining the information they contained was a compelling one that outweighed the patients' federal constitutional interests in having the information in the records remain private." Decision at p. 54-55.

3. "On the facts found by the Board, as supported by substantial evidence in the agency record, the Board's interest in obtaining the patients' psychiatric records to investigate the standard of care allegation leveled by Mr. S against Dr. Eist did not outweigh the patients' privacy interests in those highly personal records." Decision at p. 55.

4. Had the Board, Dr. Eist, or the patients sought court intervention in the period of time soon after the Subpoena was issued, the proper ruling by the court would have been that the Board was not entitled to the records in question because disclosing them would violate the patients' constitutional rights. Accordingly, Dr. Eist did not, as a matter of law fail to cooperate with a lawful investigation of the Board by not furnishing the patients' psychiatric records to the Board, in response to the Subpoena, until the patients withdrew their privacy objection."

Key Facts in the Case

Dr. Eist had been treating a mother and her two children for some time when he prepared an affidavit for use in a contentious custody proceeding stating that the mother was fit to have custody of her two children. Dec. at 16. The estranged husband subsequently filed a complaint with the Board against Dr. Eist alleging that he was overmedicating the wife and children. The Board issued a subpoena to Dr. Eist demanding the disclosure of the patients' entire psychiatric records within 10 days.

Dr. Eist immediately contacted the Board stating that the allegations were false and that he could not turn over the records without the patients' consent. The Board staff informed him that the Board had a statutory right to obtain the records without the patients' consent. Dr. Eist consulted with counsel who confirmed that patient consent was required. Dec. at 18. He contacted the mother and told her he would release the records to the Board if she and her children had no objection. He wrote the Board staff and informed them that he would cooperate with the investigation and disclose the records if the patients consented or their objections were overruled by a court order. Dec. at 19.

Dr. Eist was then informed in writing by the mother and by independent counsel for the children that they did not want their psychiatric records disclosed to the Board. An attorney for the mother also wrote to the Board informing them that she opposed disclosure of the records to the Board. Dec. at 21. The Board staff wrote Dr. Eist and told him he had 5 days to respond to the allegation and 48 hours to produce the records of his patients. That letter informed him that the Board was not required to obtain the patients' consent for disclosure.

Dr. Eist's counsel then wrote the Board's staff enclosing copies of the letters from counsel for the patients objecting to the disclosure and asking the Board to take the patients' objections into account. Dec. at 22. The Board never responded but issued subpoenas for and obtained pharmacy records for the patients. Dec. at 23. The Board then charged Dr. Eist with "failure to cooperate with a lawful investigation" for his refusal to disclose his patients' records. Dr. Eist's counsel then notified the attorneys for the patients that unless they objected within one week, Dr. Eist would disclose their psychiatric records In response to the subpoena. When no objection was forthcoming, Dr. Eist disclosed the records. Dec. at 24.

The Board referred the complaint to a peer review committee which concluded that Dr. Eist had not provided inappropriate medication to the patients. Dec. at 24. The Board adopted that decision but did not inform Dr. Eist of their decision because they had decided to prosecute the "failure to cooperate" charge. Dec. at 25. That charge was argued before an Administrative Law Judge who found in Dr. Eist's favor on the grounds that he had lawfully heeded

his patient's objections and that the Board failed to evaluate the patients' privacy interests under the *Westinghouse* factors. The Board reversed the ALJ's decision on the grounds that the Board's statutory authority to obtain medical records will always outweigh the patients' privacy interests. The Board imposed a sanction and a $5000 fine on Dr. Eist for his "failure to cooperate". Dec. at 26.

On appeal, the Circuit Court for Montgomery County reversed the Board's decision on the ground that the Board made an "error of law" in concluding that it had an absolute right to the patients' records regardless of their constitutional right to privacy. Dec. at 27. The case was remanded for further findings on whether the Board's interest would override the patients' privacy interests under the *Westinghouse* factors. In preparing for another ALJ hearing, Dr. Eist's counsel discovered that the original complaint had been resolved in Dr. Eist's favor.

After a full evidentiary hearing, the ALJ found that the state had not properly evaluated the patients' privacy interests and concerns under the federal constitution and the *Westinghouse* factors. Dec. at 28. The Board again reversed the ALJ finding that it had properly considered the patients' privacy interests. Dec. at 29. On appeal again to the Circuit Court for Montgomery County, the Court again reversed the Board's decision and dismissed all charges against Dr. Eist. The state took this appeal to the Maryland Court of Special Appeals. Dec. at 29.

Significant Facets of the Decision

One of the features of this decision that makes it significant is that it held that the federal constitution prohibits the automatic disclosure of patient's health information even when a statute specifically authorizes the state to obtain that information without patient consent. The state statute recognizes a psychiatrist-patient privilege but provides an exception for disclosures to professional licensing and disciplinary boards. Dec. at 8. The statute further states that it does not preclude a health care provider or person in interest from filing a motion to quash the subpoena or seeking a protective order asserting a constitutional right. In this case, neither Dr. Eist nor his patients filed a motion to quash or sought a protective order.

It is also significant that the Court upheld the privacy rights of the patients even though they were asserted only by the physician. The patients were not a party to appeals at any level.

The decision is also significant, as the Court notes, because it is one of the few (and the only reported case in Maryland), that has applied the *Westinghouse* factors and found in favor of the physician. Dec. at 45.

Perhaps the most significant facet of the decision is the holding that, regardless of the statutory authority conferred by the state legislature, the federal constitution requires a state agency to evaluate a patient's privacy interests and concerns under the *Westinghouse* factors once an objection has been raised. While the state agency may apply those factors, the patient or his or her physician can contest the state's determination in court, and the court is not required to defer to the agency's determination.

It is also significant that, even though the HIPAA Privacy Rule was not mentioned in the decision, the Rule does not protect the privacy of those records if, as in this case, disclosure is required by law. 45 C.F.R. §164.508(a)(2). The federal constitution only protects individuals against privacy violations that can be ascribed to the government. Dec. at 11 citing *Citizens for Health v. Leavitt*. So privacy violations by private entities are not prohibited by the constitution and, in fact, are expressly authorized by the HIPAA Amended Privacy Rule.

The *Westinghouse* factors and significant findings by the Court with respect to each are as follows:

1. The type of records subpoenaed and the information they contain.

   "Without question, notes of psychiatric treatment sessions "contain information of a highly private nature." Dec. at 39.

2. The potential for harm in subsequent non-consensual disclosure of the subpoenaed records.

   "Because a patient's mental health records ordinarily will contain extremely personal information that the patient would not want disclosed to anyone, and because knowledge by others of the mere fact that a person has undergone or is undergoing psychiatric treatment itself can be stigmatizing to the person…the possible harm from redisclosure of such records is significant." Dec. at 39-40.

3. The injury in disclosure to the relationship for which the record was generated.

   "In fact, the psychiatrist-patient relationship depends in large part upon the patient's having the trust in the doctor and confidence in the privacy of the therapeutic relationship that will foster a willingness to disclose innermost thoughts. That relationship can be damaged merely by the threat that the records containing the patient's most personal thoughts will be turned over to others to examine." Dec. at 42-43.

4. The adequacy of the safeguards to prevent unauthorized disclosure.

   While there was evidence that safeguards were in place to prevent redisclosure, the Court found that "[n]evertheless, the potential for harm if those safeguards are breached is great." Dec. at 43.

5. The Government's need for access to the documents.

   "That general proposition that a need exists is not sufficient, however, to measure the government's need in a given case and weigh it against the patients' competing privacy interests in the same given case." Dec. at 45.

6. Whether there is an express statutory mandate, articulate public policy, or other public interest militating towards access.

   "Plainly, it is the public policy of Maryland, as recognized by the legislature, that health care provider disciplinary boards have the tools necessary to investigate alleged wrongdoing by health providers." Dec. at 49. In other cases there was "some support for the allegation against the health care provider. In this case, there was nothing." Dec. at 53.

Significance of the decision

The significance of the decision would be difficult to overstate. The decision is extremely detailed and well researched and finds that a constitutional right to health information privacy can prevail even in the face of express statutory authority. This is extremely significant at a time when we have a federal health information "privacy" rule that authorizes routine uses and disclosures of sensitive health information without the patient's consent and over his or her objection. It is also significant in view of the fact that some members of Congress appear to want to enact legislation establishing an electronic health information system without basic privacy protections.

Finally, this decision should be viewed as a model for state legislation that not only requires licensing boards to provide patients with notice that their records have been subpoenaed but also requires the boards to evaluate the patient's privacy interest when an objection to disclosure is raised.

The case stands for the proposition that patients do not have the burden to show why their constitutional right to health information privacy should not be overridden, but rather, the burden is on the government to show why it should.

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