Supreme Court of the United States

HAROLD I. EIST, M.D.,
Petitioner,

v.

MARYLAND STATE BOARD OF PHYSICIANS,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a state restrict a patient's federal constitutional right to privacy by compelling a physician to disclose confidential patient records without notice to and authorization by the patient and in conflict with the physician's ethical obligations?

2. May a state agency simultaneously serve as investigator, prosecutor and adjudicator with respect to a licensee under its jurisdiction without amending the state's constitution which explicitly separates legislative, executive and judicial powers?

3. May a physician be disciplined by a state's medical licensing board if:

   a. the relevant statutory language – "fails to cooperate with a lawful investigation" – is unconstitutionally vague;

   b. the board never notified the patients it was seeking their confidential medical records; or

   c. the board's simultaneous roles as investigator, prosecutor and adjudicator deprive Petitioner of his right to due process?

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OPINIONS BELOW

By an Order filed February 17, 2011, the Maryland Court of Appeals denied Petitioner's Motion for Reconsideration of its Opinion, filed January 21, 2011. The Order is included as Appendix A (1a-4a).[1] The Opinion is included as Appendix B (5a-34a)[2] and is reported at 417 Md. 545 (2011). The Court of Appeals reversed the Judgment of the Maryland Court of Special Appeals ("COSA") and remanded the case to COSA with "DIRECTIONS TO REVERSE

[1] The "a" after a page number refers to the page in the Petitioner's Appendix.

[2] The text of the Opinion reflects corrections appended to the February 17, 2011 Order.

THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AND REMAND THE CASE TO THE CIRCUIT COURT WITH DIRECTIONS TO AFFIRM THE DECISION OF THE MARYLAND STATE BOARD OF PHYSICIANS" (31a) (emphasis in original).

The September 13, 2007 decision of the Court of Special Appeals of Maryland is included as Appendix C (35a-94a) and is reported at 176 Md. App. 82 (2007). COSA's decision affirmed the Order and Final Judgment of the Circuit Court for Montgomery County.

The March 29, 2006 Order and Final Judgment of the Circuit Court for Montgomery County, entered April 5, 2006, is included as Appendix D (95a-96a). It reversed the Final Opinion and Order of the Maryland State Board of Physicians, dated June 22, 2005 and instructed the Board to dismiss all charges. The court's reasoning was stated in open court at a hearing held on March 7, 2006. The transcript for that hearing is included as Appendix E (97a-159a).

The Final Opinion and Order of the Maryland State Board of Physicians, dated June 22, 2005, is included as Appendix F (160a-190a). This Final Opinion and Order reprimanded the Petitioner and fined him $5,000 for "failing to cooperate with a lawful investigation" despite findings by the Administrative Law Judge ("ALJ") to the contrary and a recommendation that the charges by the Board against the [Petitioner] be dismissed (233a-234a).

The Proposed Decision of the ALJ, dated November 16, 2004, is included as Appendix G (191a-240a). The ALJ heard the matter on remand from the Circuit Court for Montgomery County.

On July 31, 2003, an administrative appeal was heard in the Circuit Court for Montgomery County. A transcript for that hearing is included as Appendix I (242a-283a). Pursuant to a court order, dated August 15, 2003 (entered August 19, 2003), that transcript serves as the court's opinion and order. This Order is included as Appendix H (241a).

The Final Decision and Order of the Maryland State Board of Quality Assurance (now the Maryland State Board of Physicians) (hereinafter, the "Board" or the "Respondent"), dated January 28, 2003 is included as Appendix J (284a-298a). The Board reprimanded and fined the Petitioner despite the finding by the ALJ that the Petitioner "responded appropriately within the scope of his ethical obligations to his patients" (334a) and a recommendation that the charge against him be dismissed (335a).

The ALJ's Proposed Order, dated August 14, 2002, is included as Appendix K (299a-335a).

The Respondent's Subpoena to Petitioner, dated March 15, 2001 is included as Appendix L (336a-337a).

JURISDICTION

The Opinion of the Maryland Court of Appeals was entered on January 21, 2011. Petitioner timely filed a Motion for Reconsideration which was denied pursuant to an Order of the Maryland Court of Appeals, dated February 17, 2011. Because this Petition is timely filed and Petitioner has raised constitutional challenges to the Subpoena throughout the proceedings below, jurisdiction is appropriate pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

United States Constitution:

Amendments IV, V, and XIV, Section 1 are included as Appendix M (338a-339a).

Maryland Constitution:

Articles 8, 19 and 20 of the Declaration of Rights of the Maryland Constitution are included as Appendix N (340a).

STATUTORY PROVISIONS[3]

Section 14-404(a)(33) of the Health Occupations Article ("HO") provides: ". . . [The Maryland State] Board [of Physicians] . . . . may reprimand any licensee, place any licensee on probation, or suspend or revoke a license if the licensee: (33) Fails to cooperate with a lawful investigation conducted by the Board". This and other sections of HO are included as Appendix P (349a-351a).

Sections 4-306 (Disclosures without authorization of person in interest-Investigations), 307 (Disclosure of mental health records), and 308 (Liability for good faith actions) of the Health General Article ("HG") are lengthy and are included in Appendix O (341a-348a).

Section 10-222 of the State Government Article ("SG"), regarding judicial review of agency decisions is lengthy and is included as Appendix Q (352a-355a).

Section 9-109 of the Courts and Judicial Proceedings Article ("CJ"), regarding communications between

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[3] Found in Michie's Annotated Code of the Public Laws of Maryland.

patient and psychiatrist or psychologist is lengthy and is included as Appendix R (356a-357a).

THE PARTIES

The Petitioner is a locally[4], nationally[5], and internationally[6] known psychiatrist. He is a leading authority on the confidentiality of medical records. Petitioner chaired the Confidentiality Committee of the Washington Psychiatric Society which developed the model confidentiality statute that was adopted in our nation's capital.

The Respondent is the Maryland State Board of Physicians. The Board is responsible for the licensure and discipline of physicians in Maryland (38a).

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[4] Petitioner has served three terms as President of the Washington Psychiatric Society and is a Clinical Professor of Psychiatry and Behavioral Sciences at the George Washington University's School of Medicine and Health Sciences.

[5] Petitioner is a past-President of the American Psychiatric Association ("APA"). *Circa* Petitioner's tenure as either President or President elect of the APA, the association submitted an *amicus curiae* brief which was referenced by this Court in *Jaffe v. Redmond*, 518 U.S. 1 (1996) (the leading case regarding the privilege for psychotherapy). During the course of and as a result of Petitioner's strong stand protecting patient rights in the instant case, the American Psychiatric Association awarded Petitioner its 2003 "Profile in Courage" award for having upheld the profession's principles of patient confidentiality; *cf*, John F. Kennedy, *Profiles in Courage* (1955) (This book described politically courageous actions taken by various United States Senators); *cf* Harold J. Bursztajn, M.D., *Prescriptions for Hope, reprinted at* www.forensic-psych.com/articles/artPrescriptions ForHope.php (This article describes the risk a doctor displayed by treating a Jewish person (author's father) shot by the Nazis in the Lodz ghetto during World War II).

[6] Petitioner is active in the World Psychiatric Association and has lectured in at least eleven countries and the Vatican.

STATEMENT OF THE CASE

This case arises out of a split (4-3) decision of the Maryland Court of Appeals which reinstated a fine and reprimand against Petitioner (a psychiatrist) imposed by Respondent, the state's medical licensing board, for allegedly failing to turn over psychiatric records of three patients to the board after the patients refused to allow the Petitioner to release those records. In order to pressure the Petitioner to release the records despite his patients objections, the Board charged Petitioner with a violation of HO § 14-404(a)(33) ("fails to cooperate with a lawful investigation"). After the resolution of a bitter divorce/custody dispute between one of the patients and the Complainant, the parent-patient and the court-appointed attorney representing the two minor-patients agreed to allow the Petitioner to release the records to the Board, which Petitioner did. In turn, the Board sent the records to a peer review committee which exonerated the Petitioner of the underlying allegations of violating standards of care.[7] In connection with the alleged violation of subsection 404(a)(33), the Board issued an order disciplining the Petitioner despite proposed findings of fact and conclusions of law by an independent administrative law judge to the opposite effect. Upon review by the Circuit Court for Montgomery County, a second set of proposed and final findings and conclusions of law were issued by the ALJ and Board, respectively. Again the ALJ would have cleared the Petitioner, but

[7] The Complainant was not any of the patients but rather the estranged husband of one of the patients (and father of the other two patients).

the Board disciplined him.[8] The Board's decision to discipline the Petitioner was reversed by the Circuit Court for Montgomery County. Furthermore, in a very detailed and lengthy decision, the Maryland Court of Special Appeals affirmed the Circuit Court's Decision. The Court of Special Appeals held that the Board's interest in the records did not outweigh the patients' privacy interest in those records and the Board was not entitled to the records. Consequently, Petitioner could not have been found to have failed to cooperate. Dissatisfied with the outcome in the intermediate appellate court, the Board petitioned the Court of Appeals which reversed the decisions below and reinstated the fine and reprimand. The Court of Appeals reasoned that because neither the Petitioner nor his patients moved to quash the subpoena[9] or otherwise seek judicial intervention, the Petitioner had "failed to cooperate." The Court of Appeals did not perform a balancing test, as the Court of Special Appeals had, to weigh the interests of the Board in obtaining the records against the patients' right to privacy in those records.

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[8] The Board insisted that Petitioner failed to obey, timely, the subpoena for production of documents.

[9] During the entire course of this matter, the Board never served its Subpoena upon the Petitioner's patients.

REASONS FOR GRANTING THE PETITION

I. A STATE MAY NOT EVADE A PATIENT'S CONSTITUTIONAL RIGHTS TO PRIVACY AND DUE PROCESS WHEN IT INVESTIGATES A PHYSICIAN BY SERVING ITS *SUBPOENA DUCES TECUM* FOR MEDICAL RECORDS UPON THE PHYSICIAN BUT NOT THE PATIENT

A. While it is generally acknowledged that patients have a right to privacy in their medical records and information, this court has left open the question of the scope of that right.

To date, the scope of a patient's right to privacy in his or her medical records has not been fully decided by this Court.

Thirty-four years ago, this Court noted:

> "The concept of a constitutional right to privacy still remains largely undefined. There are at least three facets that have been partially revealed, but their form and shape remain to be fully ascertained. The first is the right of the individual to be free in his private affairs from governmental surveillance and intrusion. The second is the right of the individual not to have his private affairs made public by the government. The third is the right of an individual to be free in action. . . ."

Whalen v. Roe, 429 U.S. 589, 599 (1977) (quoting Professor Kurland). *See also, Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) ("[T]he right to confidentiality includes the right to protection regarding information about the state of one's health . . .

[T]here are few matters that are quite so personal as the status of one's health, and few matters the dissemination of which one would prefer to maintain greater control over") (internal citations and quotation marks omitted).

This case is an appropriate vehicle for the Court to define the scope of the right to privacy in medical records because it avoids the passions associated with cases involving abortion rights and religious fervor.

One approach this Court may consider adopting, should it grant this Petition, is the multi-factor test applied in *United States v. Westinghouse*, where the Third Circuit stated:

> "There can be no question that an employee's medical records, which may contain intimate facts of a personal nature are well within the ambit of materials entitled to privacy protection. Information about one's body and state of health is ordinarily entitled to retain within the "private enclave where he may lead a private life."

638 F.2d 570, 577 (3d Cir. 1980).[10] This case is perhaps the leading case on the subject of the right to privacy in medical records and was referenced extensively by Maryland Court of Special Appeals (35a-94a) but was never mentioned by the Maryland Court of Appeals (5a-34a). In fact, 24 references to the *Westinghouse* case are contained in the Appendix to this Petition. To balance a patients' right of privacy in medical records against Maryland's need to obtain

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[10] The concept of a private enclave underlies Fourth and Fifth (and Fourteenth) Amendment jurisprudence. *See, e.g. Miranda v. Arizona*, 384 U.S. 436, 459-60 (1966).

those records, the Court of Special Appeals held that a court should consider the following factors:

> [T]he type of record requested, the information it contains, the potential for harm in subsequent nonconsensual disclosure, the injury in disclosure to the relationship for which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the government's need for access, and whether there is an express statutory mandate, articulate public policy, or other public interest militating towards access.

(47a-48a) (citing *Westinghouse*, 638 F.2d at 578) (other citations omitted).[11]

To determine the scope of a patient's right to privacy in his or her medical records, Petitioner suggests that the Court begin with an examination of the ethical duties of physicians.

The duty of a physician to maintain the confidences of his or her patient was first expressed in the Hippocratic Oath approximately two and one half millennia ago. Since then, those who have entered the medical profession have subscribed to this oath which provides:

> What I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself. . . .

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[11] Prior to this case, the *Westinghouse* test was used by the Maryland Court of Special Appeals in *Dr. K. v. State Board of Physician Quality Assurance*, 98 Md. App. 103, 632 A.2d 452 (1993), *cert. denied* 334 Md. 18, *cert. denied* 513 U.S. 817 (1994) and by the Maryland Court of Appeals in *Doe v. Maryland Board of Social Worker Examiners*, 384 Md. 161, 862 A.2d 996 (2004).

U.S. Congress, Office of Technology Assessment, *Protecting Privacy in Computerized Medical Information*, OTA-TCT-576 at 38 ("*Protecting Privacy*") (U.S. G.P.O. Sept. 1993).

Such or similar principles of non-disclosure have been practiced around the world for hundreds of years.[12] Various codes of medical ethics incorporate these principles, both currently[13] and historically[14]. Indeed, it was understood by at least some of our nation's founders[15] and by John Locke, a physician

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[12] *See e.g.*, Bioethics – Codes, Oaths, Guidelines and Position Statements *reprinted at* www.library.dal.ca/kellogg/Bioethics/codes/codes.htm.

[13] *See e,g.*, AMA, Office of General Counsel, Division of Health Law, Patient Confidentiality (1998) *reprinted* at www.ama-assn.org/ama/pub/category/4610.html.

[14] *Protecting Privacy* at 38. In 1803, Thomas Percival, an English physician published a medical ethics code to guide doctors in their treatment of patients. At its first meeting (*circa* 1847), the American Medical Association ("AMA") adopted an ethics code that utilized Dr. Percival's language with little change. The AMA's first ethical code provided:

> The obligation of secrecy extends beyond the period of professional services – none of the privacies of personal and domestic life, not infirmity of disposition or flaw of character observed during professional attendance, should ever be divulged by [the physician] except when he is imperatively required to do so. The force and necessity of this obligation are indeed so great, that professional men have, under certain circumstances, been protected in their observance of secrecy by courts of justice.

Id.

[15] Four of the signers of the Declaration of Independence were physicians. The physician signers were Josiah Bartlett, Benjamin Rush, Matthew Thornton and possibly Lyman Hall (his credentials are in dispute). Furthermore, Dr. Samuel Freeman Miller served on this Court from 1862 to 1890. Richard

whose writings provide a substantial part of the Constitution's intellectual and philosophical foundation. Petitioner suggests that the right to keep patient physician communications and records confidential is so basic a right that our Founders would have considered it a fundamental or inalienable right of every individual, if the Founders had taken the time to consider it. Today, the United States Department of Health and Human Services[16] and some members of Congress[17] consider medical privacy/ confidentiality such a fundamental right.

For more than two thousand years, physicians and patients have understood that a patient receives better care if the patient candidly discloses private information, *e.g.* medical history, symptoms, and treatments, to the physician. *Protecting Privacy*, at 5-6.

At the time Petitioner received the Subpoena, the American Medical Association ("AMA") adhered to these principles. The AMA indicated that information disclosed by a patient to a physician during the course of their relationship is confidential to the utmost degree. The Fourth Principle of Medical Ethics provided that: "[a] physician shall respect the rights of patients, colleagues, and other health professionals, and shall safeguard patient confidences

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F. Corlin, M.D., (President, American Medical Association), *History Repeats Itself: Physicians Face Another 5.4% Issue* (Amednews.com, April 15, 2002).

[16] 65 Fed. Reg. 82464 (December 28, 2000).

[17] *See e.g.*, S.2201, 107th Cong., 2d Sess., § 3(1), 148 Cong. Rec. S2957-63 (April 18, 2002).

and privacy within the constraints of the law."[18] According to the AMA's Council on Ethical and Judicial Affairs, the purpose of the physician's confidentiality duty is to allow the patient to feel free to make a full and frank disclosure with the knowledge that the physician will protect the confidential nature of the information disclosed. With full disclosure, physicians are able to diagnose properly and treat patients appropriately. In exchange for this patient candor, physicians agree to not release confidential information or communications without the patient's consent unless they are required to do so by law (the issue herein) or where the patient threatens bodily harm to himself and others.[19]

The general practice regarding the release of a patient's medical record is that the information contained in that record may only be released to a third party with the approval of the patient. For example, a patient's express consent is required to release his or her medical record to any of the following parties: patient's attorney, insurance company, family member (unless there is a durable power of attorney), employer (unless there is a worker's compensation claim), and other third parties. State law governs who may consent to the release of a medical record (e.g. patient, parent, guardian, administrator

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[18] American Medical Association, House of Delegates, Principles of Medical Ethics (June 17, 2001).

[19] American Medical Association, Current Opinions of the Judicial Council of the American Medical Association, § E5.05, *reprinted in* Robert E. DeWitt, Anita Ellis Harton, William E. Hoffman, Jr., Robert M. Keenan, & Marie B. Ellis, *Patient Information and Confidentiality,* in TREATISE ON HEALTH CARE LAW, ¶16.01[1](A. Capon & I. Birnbaum, eds., 2001).

or executor of decedent's estate) and to whom it may be released.

It is important for this Court to understand that the essence of the patient – physician relationship is trust. Trust allows patients to reveal the most intimate details of their lives to their physicians. When a patient fears disclosure, he or she may withhold some symptom or fact that the physician needs to properly diagnose and treat the patient. Furthermore, when a physician is fearful of disclosure, he or she may record the patient's information selectively. Regardless of whether it is the patient or the physician who withholds information, the process of healing is harmed nevertheless.

The Court of Appeals Opinion gives the Respondent unfettered access to confidential medical information without patient authorization. It did not use the *Westinghouse* standards to weigh the Respondent's need for access against the patients' right to privacy, as was done by the Court of Special Appeals.

B. Because Patients And Physicians Have Distinct And Potentially Conflicting Interests In The Patient's Medical Records, A State Must Serve A Subpoena On Both The Patient And His Or Her Physician In Order To Satisfy Due Process.

The Due Process Clauses of the Fifth and Fourteenth Amendments guarantee that no person shall be deprived of life, liberty, or property without due process of law. U.S. CONST. amends. V and XIV, sec. 1. As the Court has said: "[o]ur precedents establish the general rule that individuals must receive notice and an opportunity to be heard before

the Government [, state or Federal,] deprives them of [life, liberty, or] property." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993).

Because the "fundamental requisite of due process . . . is the opportunity to be heard . . . This right to be heard has little reality or worth unless one is informed the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Richards v. Jefferson County*, 517 U.S. 793, 799 (1996) (quoting *Mullane*); *Dusenbery v. United States*, 534 U.S. 161, 173 (2002) (Ginsburg, J., dissenting). This Court has clearly articulated the controlling principle:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice *reasonably calculated*, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Brief for the United States, *Dusenbery v. United States* (Docket No. 00-6567) (quoting *Mullane)* (emphasis added in Brief)

According to the Maryland Court of Appeals both the Respondent and his patients could have moved to quash the subpoena but they did not. The Court said:

> Under § 4-306 and 4-307 of the Health-General Article of the Maryland Code, Dr. Eist's exclusive remedy was to file, in the Circuit Court for Montgomery County, a motion to quash the subpoena or a motion for a protective order. He was not entitled to refuse timely compliance with

> the subpoena, refrain from filing a motion to quash or a motion for a protective order, and later, in this collateral contested case administrative proceeding, challenge the subpoena.

Opinion (31a). This reasoning is somewhat puzzling because it was the Board and not the Petitioner that bifurcated the standards of care charge from the "failure to cooperate" charge. While the standards of care charge was ultimately withdrawn by the Board (13a, 36a), the Board continued to prosecute the "failure to cooperate" charge based solely upon its Subpoena to the Petitioner. The Subpoena is at the core of the Board's charge and proving the Subpoena's validity is essential and not "collateral" to the Board's case.

The Court of Appeals' rationale completely ignores one fact: the lack of notice to the patients, a critical component of this Court's Due Process jurisprudence. Instead, the Petitioner faced a Hobson's Choice. He could choose to comply with the subpoena and thereby ignore his professional obligation to maintain patient confidentiality. Alternatively, Petitioner could choose to protect his patients' privacy by objecting to or by not complying with the subpoena, but then he would run the risk of being sanctioned by the Respondent (which is what occurred in this case). In Maryland, the psychotherapeutic privilege belongs to the patients and not the psychiatrist treating those patients. *See* CJ § 9-109(b) (356a-357a). Because both the Petitioner and his patients had interest in the records, the Court of Appeals should have addressed questions of record ownership and control before it reversed the decision of the Court of Special Appeals and approved the reprimand and fine of the Petitioner.

II. BY COMBINING INVESTIGATORY, PROSECUTORIAL AND ADJUDICATORY FUNCTIONS INTO A SINGLE AGENCY, *I.E.* THE STATE BOARD OF PHYSICIANS, MARYLAND HAS DENIED PETITIONER THE PROCESS HE IS DUE AND HAS IGNORED ITS OWN CONSTITUTION.

Where, as here, a state imparts investigatory, prosecutorial and adjudicatory functions to one of its agencies, justice and fair play are denied when that agency simultaneously undertakes those functions with respect to a single matter. To provide justice and fair play, and to meet the requirements of due process, an impartial decision maker is essential.

In this case, the Board did not seek a neutral tribunal to determine who controlled the disclosure of the medical records: the Board itself, the Petitioner or the Petitioner's patients. The Board merely threatened the Petitioner with a sanction in order to gain access. Not only has the Board appealed adverse rulings by both the Court of Special Appeals and Circuit Court for Montgomery County, but the Board also has ignored a proposed order (exonerating the Petitioner) submitted to it by an impartial Administrative Law Judge.

Furthermore, the performance of the multiple functions bestowed on the Board appear to directly contradict the strict Separation of Powers Doctrine set forth in Article 8 of the Declaration of Rights in the Maryland Constitution (340a). Article 8 provides:

> That the Legislative, Executive and Judicial powers of the Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said

> Departments shall assume or discharge the duties of any other.

Id. This separation of powers may not be altered statutorily, *i.e.* it may not be altered without an amendment to the Constitution of the State of Maryland. The Legislature, Governor and Judiciary are powerless to empower an agency with such combined powers. An amendment, properly enacted, pursuant to the procedures specified in Maryland's Constitution is required.

III. SUBSECTION 14-404(A)(33) IS HOPELESSLY VAGUE

Section 14-404(a)(33) provides that "the Board . . . may reprimand any licensee, place any licensee on probation, or suspend or revoke a license if the licensee: . . . (33) fails to cooperate with a lawful investigation" (349a). According to this language, a physician has no idea what conduct is permitted and what conduct is prohibited.

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an

> ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972) (footnotes omitted).

The word "fail" is imprecise. Consequently, the Court of Special Appeals, the Administrative Law Judge and two judges of the Circuit Court for Montgomery County[20] could not find that Petitioner had "failed to cooperate"[21] while the majority of the Court of Appeals came to the opposite conclusion.

The word "lawful" is also imprecise. It sets no limit on conduct for either the Petitioner or the investigators. In fact, Petitioner believes that the investigation was not lawfully conducted because it failed to consider the privacy and due process rights of his patients, as argued in Section I of this Petition.

To analyze whether or not the Petitioner "cooperated", the Court should begin with the definition of the word "cooperate". According to Black's Law Dictionary, the word "cooperate" means: "to act jointly or concurrently toward a common end." *Black's Law Dictionary* 302 (5th ed. 1979). Thus, it is impossible for a single actor, acting alone, to "cooperate". Both parties must act or operate together. Thus, to say

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[20] As well as three dissenters on the Court of Appeals.

[21] In other words they would have exonerated the Petitioner.

someone "fails to cooperate" is a meaningless statement because one party cannot cooperate without the cooperation of a counterparty.

IV. THIS CASE IS IMPORTANT NATIONALLY

The potential impact of this case cannot be overstated. Numerous *amici curiae* already have been involved at the trial and appellate stages. The *amici* who have supported the Petitioner include physician and patient groups as well as national and state associations representing psychiatrists and psychotherapists. The National Federation of State Medical Boards, an association representing approximately seventy state and territorial medical and osteopathic licensing boards, submitted an *amicus curiae* brief to the Maryland Court of Appeals in support of the Respondent.

Finally, the decision by the Maryland Court of Appeals has serious ramifications to trusted relationships outside of the patient-physician context. The Court should note that the Hippocratic Oath was the first professional code of ethics. Many professional codes of ethics (emulating the Hippocratic Oath) have been implemented since then. *See*, Rena Gorlin, *Codes of Professional Responsibility: Ethics Standards in Business, Health and Law* (4th Ed. 1999). If a state is able to eliminate medical confidentiality and privacy other trusted relationships are in jeopardy.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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