IN THE MARYLAND COURT OF SPECIAL APPEALS

September Term, 2006

No. 00329

MARYLAND STATE BOARD OF PHYSICIANS,

Appellant,

v.

HAROLD I. EIST, M.D.,

Appellee.

Appeal from the Circuit Court for Montgomery County
(Hon. Durke G. Thompson)

BRIEF FOR APPELLEE

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STATEMENT OF THE CASE

The Maryland State Board of Physicians charged Harold I. Eist, M.D., a psychiatrist, with failing to cooperate with a lawful investigation based upon Dr. Eist's response to a Board subpoena for the mental health records of three patients. An Administrative Law Judge (twice) and two Judges of the Circuit Court for Montgomery County (Mason and Thompson, JJ.) have concluded that the Board's prosecution of Dr. Eist is ill founded in fact and in law.

The Circuit Court (Mason, J.) directed an Administrative Law Judge ("ALJ") to conduct an evidentiary hearing and make factual findings germane to (i) whether the Board's subpoena had been "lawful," and (ii) whether Dr. Eist had acted in bad faith (Record Extract ("E.") 171-188; the most pertinent decisions are also within Dr. Eist's Appendix ("Apx."); Judge Mason's ruling appears at Apx. 185a-202a). Judge Mason's Order directed that, if the ALJ's findings were adverse to the Board, the Board was to dismiss its prosecution (E. 180-181, Apx. 194a-195a; see also E. 177-178, Apx. 191a-192a).

Upon remand, an ALJ (Barchi, J.) conducted the evidentiary hearing, held the Board to the correct standard of proof (clear and convincing evidence), commented on the credibility of witnesses, and found that the Board had failed to prove it had acted lawfully and Dr. Eist had acted in bad faith (E. 190-223, Apx. 105a-138a). The Board, without conducting an additional evidentiary hearing, failed to heed the ALJ's findings and instead punished Dr. Eist (E. 6-32, Apx. 78a-104a).

The Court below (Thompson, J.) reversed and remanded with instructions that the Board dismiss all charges against Dr. Eist (E. 33-34,

102-108, Apx. 01a-02a, 70a-76a). The Court held:

> "[T]he Board, as a matter of law, has exceeded its authority in rendering its decision based on factual findings to the contrary [i.e., contrary to those found by the ALJ]. In other words, the Board's decision is contrary to law.... [T]he Board's decision is one that is not adequately supported by the facts and the law" (E. 107, Apx. 75a).

The Court also noted its belief -- as the ALJ had found -- that "there might well" have been "alternative, less intrusive" means to satisfy the Board's investigatory needs, short of reflexive resort to the subpoena (E. 107, Apx. 75a); commented that it was "troubled" by the Board's use of power to coerce Dr. Eist's compliance because "[t]his was not a stonewall," but a "legitimate ethical disagreement on what [Dr. Eist's] responsibilities were" (E. 96, 107, Apx. 64a, 75a); questioned why the Board had continued to prosecute Dr. Eist even after, as discussed below, the Board had received the records and approved Dr. Eist's medical care (E. 96-97, Apx. 64a-65a); and observed that "[t]here comes a point in time where the Board does appear obdurate" and "what it looks like to me" "is that the Board is out to get Dr. Eist" (E. 84-85, Apx. 52a-53a).

QUESTIONS PRESENTED

1. Did the Board's decision violate the Remand Order?

2. Is the Board's decision premised upon an erroneous conclusion of law?

3. Is the Board's decision supported by substantial evidence?

STATEMENT OF FACTS

A. The Complaint Triggering This Proceeding

Dr. Eist has been practicing psychiatry in Montgomery County, Maryland, for almost 40 years (E. 650, Transcript of ALJ Evidentiary Hearing ("Tr.") 574; E. 287-291, 409-424, 441-442). He has never before been the subject of any disciplinary proceeding, or indeed any claim of medical malpractice (E. 650, Tr. 574).

In 2000, one of Dr. Eist's Patients, NS, was embroiled in a bitter divorce and child custody suit in the Circuit Court for Montgomery County (E. 650, Tr. 575; E. 297, 307-309). At NS's lawyer's request, Dr. Eist provided an Affidavit rebutting the husband's charge that NS was an unfit mother, and attesting to her mental competence to retain custody of her three minor children, who also have been Dr. Eist's

Patients (E. 650, 663, Tr. 577, 632-633; E. 441-442).

Thereafter, MFS, NS's husband and a lawyer, vowed that he "was going to make [Dr. Eist's] life miserable" (E. 650, Tr. 577; E. 317, 353). In February 2001, he filed a complaint with the Board and accused Dr. Eist of having "lost any ability to practice medicine in a truly objective and professional manner"; alleged that "Dr. Eist does not like me"; related an alleged verbal disagreement about MFS's payment of certain charges; and accused Dr. Eist of "over-medicat[ing] my wife and my sons" (E. 292-294). The complaint's timing suggested a design to "catch" Dr. Eist in an unknowing denial of its existence at a deposition in the custody litigation (E. 307-309, 317-318, 357, 404). (From the beginning Dr. Eist maintained that MFS's complaint was baseless (e.g., E. 650-651, Tr. 575, 577-581; E. 297, 307-318; see also E. 647, Tr. 563; E. 303-304, 331-339, 345-347, 350-354, 404, 440) (and much later the Board so found (E. 654, Tr. 590; E. 438-439)).

B. The Subpoena And Charge

In March 2001, in support of its investigation of MFS's complaint, the Board's staff issued a subpoena to Dr. Eist for the mental health

records of NS and two of her minor children, then aged 14 and 10 (E. 296). The subpoena stated that, if Dr. Eist failed to "obey" the subpoena, then "on petition of the Board" "a court" "may punish" him "as for contempt of court" (E. 296). The Board did not then, or ever, advise Dr. Eist or his Patients of their right to contest the subpoena or object to release of the Patients' confidential information.

Immediately upon his receipt of the subpoena, Dr. Eist expressed his commitment to cooperate with the Board (E. 650-652, Tr. 575, 581-583; E. 297). He consulted Counsel, promptly notified his Patients of the Board's interest in their mental health records, and told them he would release the records to the Board if they had no objection to his doing so (E. 650, 651-652, 658-659, 662, Tr. 575-576, 581-582, 608-612, 622, 625; E. 297, 386-387). But NS, her lawyer, and the Court-appointed lawyer for the children (specifically appointed to determine whether to waive the children's confidentiality) each did object to release of the records, and asserted the Patients' right to preservation of confidentiality (E. 576, 590, Tr. 342-344, 397; E. 299-304). Accordingly, Dr. Eist informed the Board of the ethical and legal

dilemma he faced, asked the Board to discuss the matter with his Patients, and invited the Board to obtain a judicial resolution of the issue (E. 579, 652, Tr. 354, 582-583; E. 303, 307-309; see also E. 326-328 (pertinent Principles of Ethics)).

The Board never sought judicial relief, nor consulted with Dr. Eist's Patients or their lawyers, but instead its staff reissued the subpoena and asserted that, under the Board's interpretation of Dr. K v. State Board of Quality Assurance, 98 Md. App. 103, 632 A.2d 453 (1993), cert. denied, 334 Md. 18, 637 A.2d 1191, cert. denied, 513 U.S. 817 (1994) ("Dr. K"), the Board had the absolute right to these mental health records, notwithstanding the objections of Dr. Eist's Patients (e.g., E. 590, Tr. 399; E. 305-306). Adhering to this position, in February 2002, ten months after Dr. Eist had notified the Board of these objections, the Board charged Dr. Eist with "fail[ure] to cooperate with a lawful investigation" (E. 259-263). The Board filed its charge after more than seven months of silence following Dr. Eist's repeated urging that the Board seek a judicial resolution, and amidst then ongoing intense public criticism of the Board's alleged laxity in prosecuting

physicians (E. 297, 303, 307-318, 388).

The Board informed MFS that it had charged Dr. Eist with this alleged "fail[ure] to cooperate," and MFS then publicly boasted that "getting" Dr. Eist "'indicted'" was "the best thing" he had "ever done" (E. 590, 656, Tr. 400, 599; see E. 528, 530, Tr. 274-275, 283-284).

C. Dr. Eist's Production Of The Records

In March 2002, after the Board's charge, Dr. Eist's then Counsel once again notified the Patients' representatives that, unless they objected, Dr. Eist would release the records (E. 580, Tr., 358-359; E. 389-392). This time the Patients' representatives did not object (E. 580, Tr.359-360), and Dr. Eist produced the records (E. 580, Tr. 360; E. 393-396). The Board nonetheless continued with its prosecution.

D. Proceedings Below

1. Eist I: Rejection Of The Board's Absolutist Position

The Board referred its charge to the Office of Administrative Hearings and requested appointment of an ALJ. In August 2002, the ALJ (Barchi, J.), on cross-Motions for Summary Decision, issued an Opinion recommending that the charge against Dr. Eist be dismissed (E.

228-255). The ALJ concluded that the Board has no absolute entitlement to mental health records (E. 242-255). Rather, to overcome a mental health patient's claim of confidentiality, the Board must demonstrate a "compelling" need in the circumstances of a particular case (E. 246). The ALJ also wrote:

> "[In contending that Dr. Eist 'fail[ed] to cooperate,'] the Board ignores the fact that [Dr. Eist] did not simply refuse to provide treatment information or supply patients records but rather he did what the Board should have done and informed the Patients of the Board's request. Once the Patients expressed their desire to assert the privilege [Dr. Eist] was bound by legal and ethical considerations to maintain his Patients' confidentiality." (E. 252).

The Board rejected the ALJ's ruling, and held that it has an absolute right to mental health records, notwithstanding the objections of patients (E. 110-124).

Dr. Eist appealed and in July 2003, the Court (Mason, J.) reversed the Board's decision (E. 171-188, Apx. 185a-202a). The Court rejected the Board's view that Dr. K bestowed an absolute right to mental health records in all cases, and held, as the ALJ had found, that Dr. K compels a case-by-case balancing of the competing interests (E. 175-176, Apx.

189a-190a). In punishing Dr. Eist, the Board had acted in error (E. 174-175, Apx. 188a-189a).

The Court remanded the case for an evidentiary hearing and instructed that the ALJ "could determine … that in this instance those subpoenas were not lawful, because upon an analysis, they don't meet the test of Dr. Kaye [sic]" (E. 180, Apx. 194a). In that event, the Court held, Dr. Eist "would not have been in violation … because he didn't fail to respond to a lawful subpoena" (E. 180-181, Apx. 194a-195a). The Court also held that the ALJ "could find" that less intrusive means could have been used by the Board (E. 181, Apx. 195a).

The Court also suggested that the Board needed to show that Dr. Eist had acted in bad faith in order to establish "failure to cooperate" (E. 177-178, Apx. 191a-192a). Pointedly the Court observed that both the ALJ's earlier decision agreeing with Dr. Eist and Dr. Eist's reliance upon his Counsel constituted "some evidence" that Dr. Eist had acted in good faith (E. 149-150, 163-164, 178, Apx. 163a-164a, 177a-178a, 192a).

The Board did not appeal the Court's ruling, which as a result

became, as the Board conceded below (Administrative Record filed August 31, 2005 ("R."), at 383), the "law of the case."

2. Dr. Eist's Exoneration On MFS's Complaint

Despite receiving the pertinent records in March 2002, the Board delayed more than seven months to convene the necessary "Peer Review Committee" to review them (see E. 425). Dr. Eist appeared before that Committee in August 2003 (E. 426).

As of April 2004 -- 25 months after the Board had received Dr. Eist's records -- the Board had not informed Dr. Eist of the results of the Peer Review Committee's investigation (e.g., E. 654, Tr. 590). Then, as the Parties prepared for the ALJ evidentiary hearing, and only after Dr. Eist had demanded the release of any existing Report as exculpatory material, the Board released the Report (E. 654, Tr. 590; E. 444-450). That Report -- the existence of which the Board had concealed for almost five months -- revealed that its Committee unanimously had exonerated Dr. Eist from the allegations in MFS's complaint (E. 425-431). When it released the Report, the Board did not disclose what action it had taken based upon its Committee's findings.

Then in July 2004, on the eve of the ALJ evidentiary hearing, after the ALJ had ordered the Board to produce all exculpatory material and the Board had ostensibly complied with that Order, and only after a request from Dr. Eist's Counsel, the Board belatedly revealed that it had determined -- some five and one-half months earlier -- to take no further action on MFS's complaint (E. 654, Tr. 590; see also E. 275-276, 282-283, 285-286, 434-439, 451-452).

3. Dr. Eist's Motion To Dismiss

Earlier after the ruling in Eist I, and without knowledge of the Peer Review Committee's favorable findings, Dr. Eist had asked the Board to dismiss all proceedings, including what he believed was MFS's pending complaint (R. 313-322). Without disclosing that its own Peer Reviewers had already found no merit in that complaint, the Board denied the Motion, and remanded the case to the ALJ for the evidentiary hearing (E. 256-258). (When transmitting the Record to the ALJ, the Board's staff deliberately withheld the favorable Peer Review Report and the Board's decision to take no further action on MFS's complaint (E. 512, Tr. 210 ; see also E. 443)).

Dr. Eist petitioned for review of the Order denying his Motion to Dismiss (R. 329-332). Arguing that the appeal was interlocutory, the Board moved to dismiss Dr. Eist's Petition, but never disclosed that its Peer Reviewers had exonerated Dr. Eist, or that the Board had already determined to take no further action on MFS's complaint; to the contrary, the Board implied that its investigation was "ongoing" (R. 617-630).

The Circuit Court (Thompson, J.) granted the Board's Motion, and dismissed Dr. Eist's Petition (E. 455-456).

4. Eist II: The Board Adheres To Its Rejected Absolutist Position

a. The ALJ's Findings And Decision

Thereafter the ALJ presided over an evidentiary hearing at which the Parties presented ten witnesses and introduced over 50 Exhibits. In a 34-page Opinion, the ALJ concluded that the Board had failed to meet its burden of showing (i) that its subpoena had been lawful and (ii) that Dr. Eist had acted in bad faith, and proposed that the Board dismiss its charge against Dr. Eist (E. 190-223, Apx. 105a-138a).

On the question of the subpoena's lawfulness, the ALJ found:

"... [T]his record does not contain any evidence that the Board made any distinction between the mental health records of the Respondent's Patients, and a routine request for any other type of medical information to assist in a preliminary investigation....

* * *

"Since the Circuit Court definitively concluded that the Board does not have the absolute right to these records, it needed to demonstrate with supportive factual information that its subpoena for records was justified and outweighed the privacy rights of the Respondent's Patients. A mere statement that this is necessary in all cases where there is an allegation of the violation of the standard of care, without more, is not sufficient.

* * *

"... [T]he Board failed to demonstrate how a subpoena for all of the psychiatric records of three of the Respondent's patients based solely on the contents of the complaint, without more, outweighed the privacy rights of the Patients.

* * *

"The Circuit Court ... ordered that I examine the subpoena in light of the facts presented in this case to determine if the Board could demonstrate that there is a compelling interest that outweighs a patient's right to have mental health records and information remain confidential. My examination reveals that the facts of this case do

> not demonstrate the existence of the required compelling interest . . . . Accordingly, I conclude that the evidence does not support a finding that the subpoena was lawful at the outset." (E. 212, 216, 217, 220, Apx. 127a, 131a, 132a, 135a).

On the second "issue the Circuit Court directed [the ALJ] to address," the ALJ concluded, "I have no doubt based on all the evidence, that the Respondent acted in good faith and relied on his counsel" (E. 217, 220, Apx. 132a, 135a).

> "... I am convinced that the Respondent followed the only ethical course of action available to him under the circumstances. The Respondent did not fail to cooperate; rather he attempted to cooperate while preserving the integrity of the confidential relationship with his Patients." (E. 222, Apx. 137a).

b. The Board's Decision

With its Prosecutor arguing that the Order in Eist I had been only a "technical," "abstract" ruling favoring Dr. Eist (E. 715), the Board took no further evidence, refused even to consider that the ALJ decision properly had followed the "law of the case," and rejected it (E. 9, Apx. 81a). The Board mischaracterized and disagreed with the Eist I ruling (calling it Dr. Eist's "interpretation") (E. 9 & n.3, Apx. 81a & n.3),

defended its staff's failure to weigh the competing interests, and reasserted an absolute entitlement to mental health records as a matter of "general policy" and "investigative technique" (E. 13-23, Apx. 85a-95a).

The Court below reversed the Board's decision and ordered dismissal of the prosecution (E. 33-35, 102-108, Apx. 1a-3a, 70a-76a).

ARGUMENT

A. With Mental Health Records, The Board Must Demonstrate A Compelling Need Case By Case

Because "an atmosphere of confidence and trust" between a mental health professional and his or her patient is a sine qua non for successful mental health care, the confidentiality accorded mental health records is special, and differs from that attaching to any other medical record. Jaffee v. Redmond, 518 U.S.1, 10 & n.9 (1996); Laznovsky v. Laznovsky, 357 Md. 586, 613 & n.13, 745 A.2d 1054, 1069 & n.13 (2000); McCormack v. Board of Education, 158 Md. App. 292, 305-306, 857 A.2d 159, 166-167 (2004); Fisher v. State, 128 Md. App. 79, 123-124, 736 A.2d 1125, 1148-1149 (1999), aff'd in part and rev'd in part on other grounds, 367 Md. 218, 786 A.2d 706 (2001); In re Matthew R.,

113 Md. App. 701, 723-726, 688 A.2d 955, 965-967 (1997); MD Code, Health-General § 4-307 and Courts & Judicial Proceedings § 9-109. Accord, E. 628-630, 654-655, Tr. 487-489, 492-496, 592-594; E. 368-371. "'[T]he mere possibility of disclosure may impede development of'" that confidence and trust. Jaffee, supra, 518 U.S. at 11, quoted in McCormack, supra, 158 Md. App. at 306, 857 A.2d at 167.

The Board's Brief is out of focus: Dr. Eist has never challenged the Board's Constitutional or statutory authority to obtain mental health records, even without a patient's consent. But when a psychiatrist's patients object to release of their mental health records, the Board must demonstrate a "compelling" need, factually specific to the case, before it may demand the records (or punish the psychiatrist for honoring his patients' objections). Applying Dr. K, this is what the Eist I Court held. Failing to appeal that decision, the Board was bound to follow it. See, e.g., Stavely v. State Farm Mutual Automobile Insurance Co., 376 Md. 108, 115-117, 829 A.2d 265, 269-270 (2003); Stokes v. American Airlines, Inc., 142 Md. App. 440, 446, 790 A.2d 699, 702, cert. denied, 369 Md. 179, 798 A.2d 552 (2002).

In any event, the Eist I Court's rejection of the Board's absolutist view was correct. Board subpoenas may be contested, e.g., MD Code, Health-General §§ 4-307 (c), (k)(6), and no reported decision in this jurisdiction has awarded the Board an unqualified right to mental health records. E.g., Doe v. Maryland Board of Social Work Examiners, 384 Md. 161, 186, 862 A.2d 996, 1010 (a compelling state interest must "be determined on a case-by-case basis"), aff'g 154 Md. App. 520, 536, 840 A.2d 744, 754 (2004) (the competing interests must be weighed "'on the specific facts of the case'"); Dr. K, supra, 98 Md. App. at 120, 632 A.2d at 462 (weighing the competing interests results in disclosure "in this instance"); 79 Op. Md. Atty. Gen. 179, 1994 WL 86399, at * 3 (citing Dr. K for its balancing test); see also Unnamed Attorney v. Attorney Grievance Comm'n, 313 Md. 357, 364-365, 369, 545 A.2d 685, 689, 691 (1988) (agency subpoena for confidential records "may not be based upon mere conjecture or supposition" or the "bald" complaint of a third-party). Other jurisdictions are in accord. E.g., Wood v. Superior Court, 166 Cal.App.3d 1138, 1145-1150, 212 Cal.Rptr. 811, 817-821 (1985); Lieb v. Dep't of Health Services, 14 Conn.App. 552, 560-561, 542 A.2d

741, 745 (1988); McMaster v. Iowa Board of Psychology Examiners, 509 N.W.2d 754, 759-761 (Iowa 1993), cert. denied, 511 U.S. 1143 (1994); State Board of Registration for the Healing Arts v. Vandivort, 23 S.W.3d 725, 727-729 (Mo. App. 2000); Levin v. Murawski, 59 N.Y.2d 35, 42, 449 N.E.2d 730, 733-734, 462 N.Y.S.2d 836, 839-840 (1983); see also Westinghouse v. United States, 638 F.2d 570, 578, 581 (3d Cir. 1980).

B. The Board Ignored Law And Evidence

1. The Board Never Weighed The Interests

The Board presented but one witness on the weighing of the competing interests -- Barbara K. Vona, the Board's Chief of Compliance Administration (E. 488, Tr. 115-116).

a. Vona, a lawyer (id.), disclaimed knowledge of any evaluation of interests; "I do not know what was in their thought process," she admitted (E. 508, Tr. 194; see also E. 510, Tr. 201, 204). She could not say whether, before issuing its subpoena or charging Dr. Eist, the Board had even considered the Patients' interest in confidentiality (id.; see also E. 498-499, Tr. 156-158). Indeed, the very

timing of the subpoena's issuance -- two days after receipt of the complaint against Dr. Eist -- was evidence that the Board's staff had reflexively issued the subpoena (E. 490, Tr. 123-124).

b. In fact, Vona testified that the Board treated this matter with no more concern "than any other complaint"; it was a "routine matter" (E. 512, Tr. 212). The Board routinely issues a subpoena for records, regardless of whether they are mental health records; "we always go for the medical record because that's the core" (E. 491, 492, 498-499, 506, 518, 519, Tr. 126, 130, 156-158, 188, 234, 238-240). This is the very absolutist position that the Eist I Court had branded "an error of law."

2. There Were Less Intrusive Means Available

In Eist I, the Court instructed the ALJ to consider whether the Board could have used means less intrusive than the forced release of mental health records. The law requires this approach. See, e.g., Doe, supra, 384 Md. at 173, 862 A.2d at 1002-1003; accord, e.g., Wood, supra, 166 Cal.App.3d at 1148-1150, 212 Cal.Rptr. at 820-821; McMaster, supra, 509 N.W.2d at 760.

Here the Board ignored less intrusive means.

a. Vona admitted that some allegations of misconduct can be scrutinized without compelled disclosure of mental health records (E. 503-504, 519, Tr. 176-177, 238-240). The circumstances of this complaint should have raised red flags about its bona fides: There was an obvious, suspicious context and personal animus (see, e.g., E. 524-525, 527, Tr. 259-261, 271-272). The Patients, through independent legal representatives, expressed approval of Dr. Eist's treatment (E. 299-304). The complainant, MFS, whose mendacity and dissembling demeanor the ALJ had the opportunity to observe (compare, e.g., E. 527-528, Tr. 271-272 and Tr. 274-277, with E. 530, Tr. 282-284, and E. 534, Tr. 297-298, and E. 590-591, Tr. 400-401; see also E. 650-654, 664, Tr. 576-577, 579-581, 584-590, 634-637; E. 310-318, 355-358), had vowed he would make Dr. Eist's life "miserable" after Dr. Eist had supported MFS's wife in the divorce and custody dispute (E. 650, Tr. 576-577). The complaint was filed only then, after years of MFS's expressed satisfaction with Dr. Eist's care (see, e.g., E. 531, Tr. 285-286). The vitriolic complaint emphasized personal exchanges, minimized medical issues, and was unsupported by any medical expertise (see E. 524-525,

Tr. 258-261; E. 292-294). And the use of mental health records as a weapon in divorce and custody litigation is well known. See, e.g., Laznovsky, supra, 357 Md. at 592-593, 745 A.2d at 1057-1058. Even Vona acknowledged that, before Dr. Eist was charged, "[w]e certainly were aware of the bias" of MFS (E. 505, Tr. 183-184).

b. The law required the Board to try to discuss the matter with NS and the children or their counsel or guardians. MD Code, Health Occupations § 14-401(b); E. 504, Tr. 180. It never did so: The Board interviewed the complainant, but failed to give the Patients notice of the subpoena; failed to respond to communications from the adult Patient, her lawyer, and the children's lawyer; failed to interview the Patients or representatives of the minor Patients; failed to pursue other available sources of information about Dr. Eist's care and the health of these Patients (including the Report of the Court-appointed professional who had evaluated the children); and failed to consider a step-by-step approach (seeking the adult Patient's information first, for example) (E. 499, 504, 505-506, 513, 516, 517-518, Tr. 157-158, 180, 184-185, 214, 226, 229 -235; E. 404-405). Instead, a Board staff member told the

lawyer for the adult Patient that "[w]e're absolutely entitled to those records[;] [t]here's nothing you can do about it" (E. 590, Tr. 398-399).

c. No one testified that immediate production of the mental health records was the only available investigatory tool. To the contrary, Dr. Richard S. Epstein, a psychiatrist who has served as an Expert Witness for the Board (E. 593, Tr. 411-412), testified about peer-review procedures the Board has used to investigate a psychiatrist without immediate resort to mental health records (E. 596-598, Tr. 422-430). The Board's Regulations authorize this approach, COMAR 10.32.02.03, and Vona acknowledged the availability of such procedures (E. 503-504, 519, Tr. 174-180, 239). Dr. Eist testified that, had the Board commissioned peer review before receiving the records, he believed NS would have been more comfortable in allowing her mental health records to be reviewed (E. 652, 662, Tr. 583-584, 624). There was evidence available to the Board -- from NS, her representative, representatives of her children, a Court-appointed psychologist who had evaluated the children, other psychiatrists who had treated the children, Dr. Eist and his lawyer, and even from MFS himself -- that there was no

merit to MFS's complaint (E. 504-506, 517-518, 524-525, 530, 575-576, 586, 590-591, 650-651, 653-654, 656-657, 664, Tr. 180, 182-185, 229-234, 259-261, 282-284, 340-344, 381-383, 398, 400-401, 575-579, 588-590, 599, 603, 634-637; E. 300-302, 303, 304, 307-309, 310-318, 351-354, 355-358). Even without the records, the Board quickly could have verified that MFS's complaint, the sole predicate for the subpoena, was a sham to gain leverage in his matrimonial dispute.

3. Dr. Eist Acted In Good Faith

Dr. Eist did not ignore the subpoena, or flout the Board's authority. He respectfully acknowledged the subpoena as soon as he received it; notified his Patients; alerted the Board to his ethical dilemma and asked for the Board's help in resolving it; urged the Board to discuss the matter with his Patients or their legal representatives; and repeatedly advised the Board he would honor any judicial Order compelling the records' release (e.g., E. 650, 652, Tr. 575, 582; E. 297-304, 307-318, 386-387). Out of concern for his Patients, he followed a course contrary to self-interest, for instead of merely releasing records he knew would justify his treatment (as they ultimately did), he asked the Board to

proceed more deliberately and placed himself at risk for what now has been over four years of overzealous prosecution. Exhorting the Board to balance need against confidentiality was asking the Board to do what the law requires; it was not "fail[ing] to cooperate." Carrow v. Dep't of Professional Regulation, 453 So.2d 842, 843 (Fla. Dist. Ct. App. 1984); see also McDonnell v. Comm'n on Medical Discipline, 301 Md. 426, 436, 483 A.2d 76, 81 (1984) (sanction statute should be strictly construed against the Board); Vandivort, supra, 23 S.W.3d at 727-729 (Board cannot use its disciplinary process to bypass judicial review before its subpoenas may be enforced).

4. The Board's Rationale Is Flawed

a. Balance Of Interests

(i). Because the evidence revealed that the Board, before acting, had simply followed its proscribed "absolutist" view, the only proper conclusion following Eist I was for the Board to accept the findings of the ALJ. Instead the Board has engaged in forbidden post hoc rationalizations. The focus must be on the Record before the agency when it took its contested action, not on belated justifications cast now

to save that action. See, e.g., United Steelworkers of America v. Bethlehem Steel Corp., 298 Md. 665, 679-680, 472 A.2d 62, 69-70 (1984) (collecting cases).

(ii). The Board charged Dr. Eist on its mistaken belief that it did not have to justify its subpoena by weighing competing interests; the Board may not retrofit its charge to pretend that such an evaluation had occurred. See, e.g., Thanos v. State, 282 Md. 709, 712-717, 387 A.2d 286, 288-290 (1978). Moreover, permitting compelled release of mental health records, without a prior balancing of interests, will damage the therapeutic relationship before the putative interest in overriding confidentiality has been demonstrated.

(iii). In any event, the justification fails.

(a). The Board trivialized the impact of compelled disclosure on Dr. Eist's patients, and acknowledged only "possible 'stigma'" while noting that "it is difficult to predict the impact" (E. 14-17, Apx. 86a-89a). Not only does this "finding" flout the law, which secures confidentiality for effective mental health care, but it also ignores the Record. No evidence suggested there could be any benign consequence

to forced disclosure. By contrast, two psychiatrists detailed the actual presumptive injury to the therapeutic relationship that occurs from disclosure of mental health records against the patients' wishes (and this is particularly so when, as here, the patients are children) (E. 628, Tr. 487-489; E. 368-371). These witnesses included Dr. Jonas R. Rappeport, the "father of modern forensic psychiatry" instrumental in shaping Maryland's statutory protection for mental health records (see, e.g., E. 623, 627, Tr. 466-469, 484; Laznovsky v. Laznovsky, 357 Md. 586, 598-599, 745 A.2d 1054, 1060-1061 (2000); In re Matthew R., 113 Md. App. 701, 724-725, 688 A.2d 955, 966 (1997)). And there was evidence, which the Board disregarded, that NS legitimately feared the consequence of her husband's access to her mental health information (E. 652, 662, Tr. 584, 624-625).

(b). In Vona, the ALJ saw a combative, defensive witness, a natural advocate for the staff's subpoena (see, e.g., E. 506, 510-512, Tr. 187-188, 204, 206-210). (Before the hearing, Vona tried to conceal the favorable Peer Review Report and the Board's decision dismissing the complaint against Dr. Eist (E. 512, Tr. 210)). The ALJ had good reason

to reject her testimony.

b. Dr. Eist's Good Faith

(i). It would be difficult to conjure a more "demeanor-based" factual finding than a finding of "good faith," where motive and intent lay at the heart of the matter. See, e.g., State Board of Physicians v. Bernstein, 167 Md. App. 714, 760, 894 A.2d 621, 648 (2006) ("[d]emeanor most often is a factor in deciding the credibility of a fact witness [Dr. Eist] who is testifying about a fact that may be true or false [his good faith intent]"); Laws v. Thompson, 78 Md. App. 665, 677, 554 A.2d 1264, 1270, cert. denied, 316 Md. 428, 559 A.2d 791 (1989) (resolving an issue of intent "can best be determined by the trier of facts after observation of the demeanor of the witnesses"). "Good faith" is a quality "encompass[ing], among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage"; it implies "an honest intention." Bond v. Messerman, 162 Md. App. 93, 119-120, 873 A.2d 417, 432 (2005). "Bad faith" "is the opposite of good faith[;] ... it implies a dishonest purpose or some moral obliquity and a conscious doing of wrong"; "it

contemplates a state of mind affirmatively operating with a furtive design." Bond, supra, 162 Md. App. at 120, 873 A.2d at 432. The ALJ concluded that Dr. Eist had acted in "good faith"; there was not clear and convincing evidence of "bad faith." See, e.g., Maryland Board of Physicians v. Elliott, 2006 WL 2613451 *6 (Md. App., Sept. 13, 2006) (discussing the "unusually high degree of deference" to be accorded an ALJ's "demeanor-based fact-finding"). In these circumstances, there can be no punishment. See, e.g., Michaelis v. Graziano, 5 N.Y.3d 317, 322, 835 N.E.2d 650, 653, 801 N.Y.S.2d 790, 793 (2005); accord, MD Code, Health-General § 4-308 ("[a] health care provider, who in good faith ... does not disclose a medical record, is not liable in any cause of action arising from the ... nondisclosure of the medical record").

(ii). The Board argues as if the only measure of Dr. Eist's good faith was his reliance on Counsel. Reliance upon Counsel was but one ingredient of the good-faith mix: The ALJ weighed all the evidence, including Dr. Eist's concern for his Patients' fears, his career-long commitment to confidentiality, his Profession's Code of Ethics, his corroborated belief that his care was sound and MFS's complaint

baseless, his instruction from his insurance counsel to retain and heed a lawyer (E. 591-592, Tr. 403-405), and expert testimony that Dr. Eist did exactly what a psychiatrist should do in these circumstances (E. 636-638, 640-641, Tr. 519-520, 522-527, 537-539, 541). The ALJ's factual finding did not rest solely upon Dr. Eist's credible explanation that he had also received legal advice from Armin U. Kuder, an attorney with 40 years' experience on these very questions (E. 573, 647-648, Tr. 331-332, 565-567).

(iii). The ALJ found that both Kuder and Dr. Eist "were very credible witnesses and I have no reason to doubt their motives" (E. 220). Yet the Board ridiculed Kuder and questioned whether he really had represented Dr. Eist (E. 11 & n.5, 27-28, Apx. 83a & n.5, 99a-100a). The evidence was uncontradicted, however, that Kuder was Dr. Eist's attorney (e.g., E. 650, 658, 659, 661-662, Tr. 575-576, 606-607, 610-612, 621-622, 625; E. 307-308, 388-408); in four years of proceedings, neither the Board nor its Prosecutor had ever challenged Kuder's representation (see E. 307-309, 388-408; R. 237-241) (withdrawal and entry of appearances).

(iv). Ignoring Eist I's teaching that the ALJ's findings and Kuder's legal advice comprised "some evidence" of good faith, the Board invoked irrelevant authority announced after the events at issue, and its own rulings in other cases (E. 26-27, Apx. 98a-99a). The Board's rulings are retrievable, however, only if the identity of the subject physician is known. They are not searchable by rule of law or other research method; they are "secret law" ineligible to serve as precedents under stare decisis. Cf. Rule 1-104 of the Maryland Rules.

C. The Issues Here Cautioned Against The Board's Disregard Of The ALJ

The Board needed to decide whether its own staff had issued an "unlawful" subpoena. Harold A. Rose, then a staff member but at the time of decision a Member of the Board, was the person who had (i) issued the subpoena without weighing the interests, (ii) instigated a "full investigation" of Dr. Eist, (iii) suggested grounds for disciplining Dr. Eist, and (iv) advocated the Board's position and otherwise participated in challenged matters (e.g., E. 490-492, 508, 519-520, 523, 575-576, 579, 583-586, 588-590, 650-652, 657-659, Tr. 123-131, 196, 237-238, 242, 255, 339-342, 354-355, 369-372, 375-376, 381, 392-394, 397-398,

575-576, 581-582, 603, 608-609, 611-612). (Rose recused himself from the most recent Board decision (but not an earlier one) only after Dr. Eist's request that he do so (R. 211-218)).

These circumstances distinguish this from the usual case, in which the Board charges a physician with a breach of the standard of care, and the Board must decide between dueling experts. See, e.g., State Board of Physicians v. Bernstein, supra. Here the Board was passing judgment on itself, and so there was compelling need for an independent ALJ to render a decision unencumbered by fear of displeasing a fellow Board Member or the Board's staff. See, e.g., Anderson v. Dep't of Public Safety & Correctional Services, 330 Md. 187, 213-214, 623 A.2d 198, 211 (1993); see also Butz v. Economou, 438 U.S. 478, 513 (1978); Withrow v. Larkin, 421 U.S. 35, 46-47, 51 (1975).

In Dep't of Health & Mental Hygiene v. Shrieves, 100 Md. App. 283, 297-298, 302-303, 641 A.2d 899, 906, 908-909 (1994), this Court held that a Court must place heightened scrutiny on an agency's decision "when an impartial, experienced [ALJ] who has observed the witnesses and lived with the case has drawn conclusions different from the"

agency. See also id. (when "credibility is pivotal to the agency's final order, ALJ's findings based on the demeanor of witnesses are entitled to substantial deference and can be rejected by the agency only if it gives strong reasons for doing so"). Accord, e.g., Maryland Board of Physicians v. Elliott, supra, 2006 WL 2613451 at * * 6, 10; State Board of Physicians v. Bernstein, supra, 167 Md. App. at 751-753, 759, 894 A.2d at 642-643, 647; State Comm'n on Human Relations v. Kaydon Ring & Seal, Inc.,149 Md. App. 666, 693, 702, 818 A.2d 259, 275-276, 280 (2003) (applying this rule and vacating the agency's rejection of an ALJ's findings); Gabaldoni v. Board of Physician Quality Assurance, 141 Md. App. 259, 262, 785 A.2d 771, 773 (2001) ("the [agency], as a reviewing body, has little or no basis for disputing an administrative law judge's testimonial inferences"; quoting other authority).

The Board must do more than simply disagree with the ALJ's findings; it must point to evidence sufficient to satisfy its burden of proof by "clear and convincing" evidence. On every factual issue, the Board simply offers its own ipse dixit contrary to evidence before the

ALJ. The Board's rhetoric made meaningless the Eist I Court's mandate requiring a factual hearing before an objective ALJ.

The Board suggests its "expertise" excuses its disregard of the ALJ. But the issues here are matters of law (the interpretation of Dr. K, for example), to which no deference is owed, see, e.g., Maryland Board of Physicians v. Elliott, supra, 2006 WL 2613451 at * 19; Liberty Nursing Center, Inc. v. Dep't of Health & Mental Hygiene, 330 Md. 433, 443, 624 A.2d 941, 946 (1993); People's Counsel for Baltimore County v. Maryland Marine Manufacturing Co., 316 Md. 491, 496-497, 560 A.2d 32, 34-35 (1989), or turn on the ALJ's "demeanor-based fact-finding" that the Board could not so blithely disregard.

D. Other Conduct Impugns The Board's Fairness

Before the ALJ's decision, the Board's staff delayed disclosing exculpatory evidence; then its Prosecutor promised that "'no matter how this turns out, we will appeal, ... keep this going another 1 to 1-1/2 years" and "embarrass [the ALJ] again." After the evidentiary hearing, the Board's Counsel publicly called for stripping ALJ's of jurisdiction to hear Board cases (E. 454). And before the Board issued its decision, a

Board Member boasted that the Board would ignore the ALJ because "we are the highest court" (Addendum to Petitioner's Reply Memorandum, Docket Entry No. 29; see also E. 457-458).

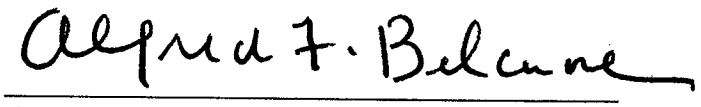
Blinded by a stubborn "will to win," and captive to its staff, the Board forgot that assuring confidentiality of mental health records "'serves the public interest.'" McCormack, supra, 158 Md. App. at 306, 857 A.2d at 167, quoting Jaffee, supra, 518 U.S. at 11. Punishing Dr. Eist serves no public interest. See McDonnell, supra, 301 Md. at 436, 483 A.2d at 81.

CONCLUSION

For the foregoing reasons, the Judgment should be affirmed.

Respectfully submitted,

MONTEDONICO, BELCUORE & TAZZARA, P.C.

By: 

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Oct. 20, 2006

PERTINENT STATUTES, REGULATION, AND RULE

Table of Contents

WEST'S ANNOTATED CODE OF MARYLAND
COURTS AND JUDICIAL PROCEEDINGS
TITLE 9. WITNESSES
SUBTITLE 1--COMPETENCE, COMPELLABILITY, AND PRIVILEGE

§ 9-109. Patient-therapist communications

(a)(1) "Authorized representative" means a person authorized by the patient to assert the privilege granted by this section and until permitted by the patient to make disclosure, the person whose communications are privileged.

(2) "Licensed psychologist" means a person who is licensed to practice psychology under the laws of Maryland.

(3) "Patient" means a person who communicates or receives services regarding the diagnosis or treatment of his mental or emotional disorder from a psychiatrist, licensed psychologist, or any other person participating directly or vitally with either in rendering those services in consultation with or under direct supervision of a psychiatrist or psychologist.

(4) "Psychiatrist" means a person licensed to practice medicine who devotes a substantial proportion of his time to the practice of psychiatry.

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

(1) Communications relating to diagnosis or treatment of the patient; or

(2) Any information that by its nature would show the existence of a medical record of the diagnosis or treatment.

(c) If a patient is incompetent to assert or waive this privilege, a guardian shall be appointed and shall act for the patient. A previously appointed guardian has the same authority.

(d) There is no privilege if:

(1) A disclosure is necessary for the purposes of placing the patient in a facility for mental illness;

(2) A judge finds that the patient, after being informed there will be no privilege, makes communications in the course of an examination ordered by the court and the issue at trial involves his mental or emotional disorder;

(3) In a civil or criminal proceeding:

(i) The patient introduces his mental condition as an element of his claim or defense; or

(ii) After the patient's death, his mental condition is introduced by any party claiming or defending through or as a beneficiary of the patient;

(4) The patient, an authorized representative of the patient, or the personal representative of the patient makes a claim against the psychiatrist or licensed psychologist for malpractice;

(5) Related to civil or criminal proceedings under defective delinquency proceedings; or

(6) The patient expressly consents to waive the privilege, or in the case of death or disability, his personal or authorized representative waives the privilege for purpose of making claim or bringing suit on a policy of insurance on life, health, or physical condition.

WEST'S ANNOTATED CODE OF MARYLAND
HEALTH--GENERAL
TITLE 4. STATISTICS AND RECORDS
SUBTITLE 3--CONFIDENTIALITY OF MEDICAL RECORDS

§ 4-307. Mental health records

* * *

(c) When a medical record developed in connection with the provision of mental health services is disclosed without the authorization of a person in interest, only the information in the record relevant to the purpose for which disclosure is sought may be released.

* * *

(k)(6) This subsection may not preclude a health care provider, a recipient, or person in interest from asserting in a motion to quash or a motion for a protective order any constitutional right or other legal authority in opposition to disclosure.

WEST'S ANNOTATED CODE OF MARYLAND
HEALTH--GENERAL
TITLE 4. STATISTICS AND RECORDS
SUBTITLE 3--CONFIDENTIALITY OF MEDICAL RECORDS

§ 4-308. Good faith disclosures

A health care provider, who in good faith discloses or does not disclose a medical record, is not liable in any cause of action arising from the disclosure or nondisclosure of the medical record.

WEST'S ANNOTATED CODE OF MARYLAND
HEALTH OCCUPATIONS
TITLE 14. PHYSICIANS
SUBTITLE 4--DISCIPLINARY ACTIONS

§ 14-401. Board procedure in disciplinary action

* * *

(b) If an allegation of grounds for disciplinary or other action is made by a patient or a family member of a patient in a standard of care case and a full investigation results from that allegation, the full investigation shall include an offer of an interview with the patient or a family member of the patient who was present on or about the time that the incident that gave rise to the allegation occurred.

* * *

.03 Proceedings under Health Occupations Article, § 14-404(a), Annotated Code of Maryland.

A. Investigation of Complaints.

(1) Designated Board staff shall undertake a preliminary investigation of each complaint as appropriate to the nature of the complaint.

(2) The Board's weekly review panel shall review a complaint in light of the preliminary investigation and may direct further investigation, referral to the faculty, dismissal, or dismissal with an advisory letter.

(3) Participation in WRP is not ordinarily a basis for recusal of a Board member from further proceedings in the case.

B. Review by the Faculty.

(1) The Faculty shall conduct a peer review when a question of standards of care in the practice of medicine is referred by the Board.

(2) Upon receipt of the report of the Faculty, the Board shall determine whether there is reasonable cause to charge a respondent with failure to meet appropriate standards of care.

C. Prosecution of Complaint.

(1) After reviewing the completed investigatory information and reports, the Board shall make its determination to:

(a) Dismiss the complaint;

(b) Take informal action by issuing an advisory letter;

(c) Request the respondent to enter into a disposition agreement with the Board;

(d) Issue a cease and desist order;

(e) Vote to charge the respondent with a violation of the Medical Practice Act or COMAR 10.32.07;

(f) Vote to deny original licensure or reinstatement of licensure; or

(g) Vote to accept a surrender on terms acceptable to the Board.

(2) In addition to charging, the Board may vote an intent to summarily suspend the license of the respondent pursuant to State Government Article, § 10-226(c), Annotated Code of Maryland.

(3) After a vote to take formal action, the Board shall refer the matter to the administrative prosecutor for prosecutorial action.

(4) Based upon a review of the case, the prosecutor may refer the matter back to the Board for further consideration.

(5) If the Board issues the charges or a notice of intent to deny licensure, the Board shall serve it upon the respondent by regular mail or hand delivery at the address the respondent maintains for purposes of licensure notice.

(6) The Board, in the notice of intent to deny, shall provide the respondent with an opportunity to request a hearing within 30 days from receipt of service.

(7) Case Resolution Conference.

(a) After service of charges or the response to the notice of intent to deny, the Board shall offer the respondent a CRC which is a voluntary, informal, and confidential proceeding to explore the possibility of a consent order or other resolution of the matter.

(b) If there is no basis for an agreement between the respondent and the administrative prosecutor, the matter proceeds to a hearing.

(c) Generally, three or four Board members compose the CRC committee.

(d) Except for consideration of a proposed resolution of a case achieved through the CRC, the Board may not make later use of any commentary, admissions, facts revealed, or positions taken, unless the subject matter is available from other sources or is otherwise discovered.

(e) Participation in a CRC is not ordinarily a basis for recusal of a Board member from further proceedings in the case.

(f) A health care provider may request the Board to schedule a CRC to address disciplinary matters before the issuance of formal charges.

(8) Offer of Surrender.

(a) If the respondent offers a surrender of a license during an investigation or after the service of charges, the Board may condition its acceptance of the surrender on the respondent's acceptance of certain conditions pursuant to Health Occupations Article, § 14-403, Annotated Code of Maryland.

(b) The conditions of surrender may include:

(i) Admissions of fact or law;

(ii) Restriction on future licensure; and

(iii) Circumstances under which the surrender was offered.

D. Representation.

(1) The respondent may appear in proper person or be represented by counsel in any matter before the Board and during any stage of the proceedings. If the matter goes to a hearing, the respondent shall be represented only by an attorney admitted to the Maryland Bar or specially admitted to practice law in Maryland under Rule 14 of the Rules Governing Admission to the Bar found in Maryland Rules.

(2) The administrative prosecutor shall present evidence at evidentiary hearings on the charges and arguments before the Board in support of charges and proposed sanctions.

E. Adjudication of Complaint or Intent to Deny Licensure.

(1) The administrative law judge shall conduct an evidentiary hearing governed by the Administrative Procedure Act and COMAR 28.02.01.

(2) During these proceedings the administrative law judge shall treat all records as confidential and sealed. This subsection does not apply to the filing of charges or notice of initial denial of license application, which are public documents pursuant to Health Occupations Article, § 14-411(g), Annotated Code of Maryland.

(3) Discovery on Request. By written request served on the other party and filed with the administrative law judge, a party may require another party to produce, within 15 calendar days, the following:

(a) A list of witnesses to be called; and

(b) Copies of documents intended to be produced at the hearing.

(4) Mandatory Discovery.

(a) Each party shall provide to the other party not later than 15 days prior to the prehearing conference or 45 days prior to the scheduled hearing date, whichever is earlier:

(i) The name and curriculum vitae of any expert witness who will testify at the hearing; and

(ii) A detailed written report prepared and signed by the expert witness summarizing the expert's testimony, which includes the opinion offered and the factual basis and the reasons underlying the opinion.

(b) If the administrative law judge finds that the report is not sufficiently specific, or otherwise fails to comply with the requirements of this section, the administrative law judge shall exclude from the hearing:

(i) The testimony of the expert; and

(ii) Any report of the expert.

(c) The administrative law judge shall consider and decide arguments regarding the sufficiency of the report at the prehearing conference.

(d) If an expert adopts the written report of the Board peer reviewer or reviewers or adopts a sufficiently specific charging document as the expert's report, that adoption is considered to satisfy the requirements set forth in this section.

(5) Parties are not entitled to discovery of items other than as listed in § E(3) and (4) of this regulation.

(6) Both parties have a continuing duty to supplement their disclosures of witnesses and documents.

(7) Absent unforeseen circumstances which would otherwise impose an extraordinary hardship on a party:

(a) Witnesses or documents may not be added to the list subsequent to the prehearing conference, if scheduled; or

(b) If no prehearing conference is scheduled, witnesses or documents may not be added to the list later than 15 days prior to the hearing.

(8) The prohibition from adding witnesses subsequent to the prehearing conference does not apply to witnesses or documents to be used for impeachment or rebuttal purposes.

(9) Construction.

(a) In hearings conducted by an administrative law judge of the Office of Administrative Hearings, § E of this regulation shall, whenever possible, be construed as supplementing and in harmony with COMAR 28.02.01.

(b) In the event of conflict between § E of this regulation and COMAR 28.02.01, § E of this regulation shall apply.

(10) The administrative law judge shall issue to the Board written proposed findings of fact, proposed conclusions of law, and if applicable, a proposed disposition after the conclusion of the hearing. The Board shall issue a final written order in the matter after a review of the recommended decision of the administrative law judge.

F. Exceptions Hearing.

(1) When the administrative law judge issues the findings of fact, conclusions of law, and proposed disposition, the respondent and administrative prosecutor, within the time period specified by the administrative law judge, which ordinarily is 15 days, may file exceptions with the Board, and the opposing party to the exceptions ordinarily has 15 days to respond.

(2) If either party files exceptions, the Board shall schedule a hearing, ordinarily 30 days after the receipt of answers to the exceptions filed, after which the Board shall issue an order containing the accepted findings of fact, conclusions of law, and a disposition.

(3) The presiding Board member, usually the Board chairman, shall determine all procedural issues that are governed by this section, and may impose reasonable time limitations. The presiding Board member may make any rulings reasonably necessary to facilitate the effective and efficient operation of the hearing. Ordinarily, the presiding Board member shall limit oral presentation by the respondent and the administrative prosecutor to 30 minutes each. The party taking the exceptions shall proceed first.

(4) If the parties do not file exceptions, the Board shall consider the recommended decision of the administrative law judge and issue its order based on the findings of fact and conclusions of law.

G. Board Action.

(1) The Board shall issue, ordinarily within a maximum of 90 days, a final order of either dismissal, revocation, suspension, denial of licensure, reprimand, probation, fine, or other disposition as appropriate.

(2) After the Board issues its order, either party may file a motion for reconsideration with the Board which is granted at the Board's discretion. There is no automatic right to a hearing before the Board, and the Board may or may not ask for a response from the opposing party.

(3) When an order of revocation or suspension states a time for reinstatement of license, the respondent shall petition the Board for reinstatement pursuant to the order. The respondent shall complete the appropriate licensure forms, include the appropriate fee, and submit these to the Board along with the petition. When a time period is not stated on the order, a petition for reinstatement may not be entertained before the expiration of 1 year after the date of the order. When reinstatement is made contingent upon the happening of an event, the respondent shall establish the occurrence of the event to the satisfaction of the Board.

H. Judicial Review.

(1) A respondent whose license has been sanctioned under Health

Occupations Article, § 14-404, Annotated Code of Maryland, may seek a judicial review of the Board's decision as provided under Health Occupations Article, § 14-408(b), Annotated Code of Maryland.

(2) An individual whose licensure or reinstatement has been denied under Health Occupations Article, § 14-404, Annotated Code of Maryland, may appeal the decision as provided under Health Occupations Article, § 14- 408(b), Annotated Code of Maryland.

WEST'S ANNOTATED CODE OF MARYLAND
MARYLAND RULES
TITLE 1. GENERAL PROVISIONS
CHAPTER 100. APPLICABILITY AND CITATION

➡RULE 1-104. UNREPORTED OPINIONS

(a) Not Authority. An unreported opinion of the Court of Appeals or Court of Special Appeals is neither precedent within the rule of stare decisis nor persuasive authority.

(b) Citation. An unreported opinion of either Court may be cited in either Court for any purpose other than as precedent within the rule of stare decisis or as persuasive authority. In any other court, an unreported opinion of either Court may be cited only (1) when relevant under the doctrine of the law of the case, res judicata, or collateral estoppel, (2) in a criminal action or related proceeding involving the same defendant, or (3) in a disciplinary action involving the same respondent. A party who cites an unreported opinion shall attach a copy of it to the pleading, brief, or paper in which it is cited.

CERTIFICATE OF SERVICE

On October 20, 2006, I mailed two copies of the foregoing Brief for Appellee, with accompanying Appendix, first-class postage prepaid, to:

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