

DEVELOPMENTS IN MEDICAL PRIVACY LEGISLATION AND LITIGATION

Presented to Mental Health Liaison Group
January 9, 2004

1. Legislation and litigation both filed on April 10, 2003—
 - A. Stop Taking Our Health Privacy (STOHP) Act of 2003 (H.R. 1709)
 - B. Citizens for Health v. Thompson, No. 03-2267 MAM (E.D. Pa.)
 1. Amended complaint filed May 5, 2003.

2. STOHP Act of 2003
 - A. Bipartisan sponsorship (20 cosponsors)
 - B. Invalidates elimination of right of consent in section 164.506 of the Amended Privacy Rule.
 - C. Reinstates right of consent for treatment, payment and health care operations while ensuring that the requirement does not impede important health care activities such as filling prescriptions and making physician referrals.
 - D. Provider may use or disclose health information without prior consent if there has been no “in-person communication” regarding such treatment, obtaining consent would be impracticable, the provider determines in the exercise of professional judgment that the individual’s consent is clearly inferred from the circumstances such as an order or referral from another health care provider, and the provider obtains written consent as soon thereafter as practicable.

3. Citizens for Health v. Thompson
 - A. Seeks to invalidate portions of the Amended Privacy Rule that eliminated the individual’s right of consent for the use and disclosure of their health information for routine purposes.
 - B. Alleges that those provisions of the Amended Rule are

arbitrary and capricious and void under the Administrative Procedure Act and violate the right to privacy and private communications under the Fifth and First Amendments of the Constitution.

- C. Suit involves 18 Plaintiffs representing approximately 3/4 of a million individuals and practitioners plus two amici curiae—the Texas Civil Rights Project and Texas Mental Health Consumers.
- D. Argued on December 10, pending on cross motions for summary judgment.
- E. Points admitted or conceded by HHS during the course of the litigation:
 - 1. Comments urging HHS to retain the right of consent in the Original Rule were received from individuals or organizations representing 220 million Americans, while only about 4000 individuals and corporations filed comments urging HHS to eliminate the right of consent. Many of the latter comments were form letters on company letterhead.
 - 2. HHS admitted that their goal is to eliminate the ability of individuals to have any control over the use and disclosure of their health information for routine purposes
 - 3. HHS admitted that “regulatory permission” was a new express grant of federal authority to covered entities to use and disclose individuals’ health information regardless of their wishes and against their will.
 - 4. The Amended Rule permits the use and disclosure of virtually any personal health information without notice or permission.
 - 5. The Rule permits the use and disclosure of personal health information over the patient’s objection.
 - 6. The Rule eliminates the therapist-patient privilege recognized in Jaffee v. Redmond.
 - 7. The Rule is retroactive to information created or maintained prior to the enactment of HIPAA.

8. The Rule eliminates the ability of individuals to protect their health privacy by paying out of pocket or avoiding health care altogether.
 9. The Rule has resulted in most practitioners and other covered entities refusing to provide a consent process even where consent is requested by patients or required by standards of professional ethics and state law.
 10. The “minimum necessary” standard provides no control to the individual because it is to be applied solely at the discretion of the covered entity.
4. “Effective psychotherapy...depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears.” Jaffee v. Redmond, 116 S. Ct. 1923,1928 (1996). Does that atmosphere exist after April 14, 2003?