2006 WL 6659778 (W.D.La.) (Expert Report and Affidavit)
United States District Court, W.D. Louisiana.

MAIER,

v.

GREEN et al.

No. 06CV00715.
December 16, 2006.

(Report or Affidavit of John C. Simoneaux, Ph.D.)

Name of Expert: John Simoneaux
Area of Expertise: Psychiatry & Psychology >> Psychology
Representing: Plaintiff
Jurisdiction: W.D.La.

December 16, 2006

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Mr. Marx,

Let me start by sincerely apologizing for not getting this to you sooner. Last week got away from me and the end of the week came before I realized. I hope that this has not caused any inconvenience for either you or Ms. Maier.

It is my understanding that this case revolves around Ms. Maier's arrest by Lafayette Police for refusing to grant access (and thus reveal the identity) of a patient who was on the premises of Lafayette General Medical Center. You asked for a review of **HIPAA** regulations and procedures and for me to provide an opinion about whether Liz was acting in accord with **HIPAA** in her interactions with the officer.

I read through the narrative outline provided by Ms. Maier, as well as your own summary titled “Basic Info”. Thank you for the information.

It seems to me that there are several important elements, including the **HIPAA** “Privacy Rules”, that should have influenced Ms. Maier's decision-making process in this matter. Since Liz is a Licensed Clinical Social Worker and, I presume a member of the National Association of Social Workers, her licensing law and professional ethical code also address concerns relating to privacy and confidentiality. I will try to address each of these in turn.

HIPAA

The **HIPAA** Privacy Rules were promulgated and are enforced by the U.S. Department of Health and Human Resources. I found, on DHH's website, an FAQ section that addressed the following question:

"When does the Privacy Rule allow covered entities to disclose protected health information to law enforcement officials?"

This can be found at the following web site (*http:// healthprivacy.answers.hhs.gov/cgi-bin/hipaa.cfg/php/ enduser/std adp.php?p_ faqid=505&p_created=1090595067&p_sid=CDAxxjpi &p_accessibility=0&p_Iva=&p_Iva=& p_SD=cF9zcmNoPTEmcF9zb3J0X2J5PWRmbHQmcF9ncmlk D0mcF9yb3dfY250PT10MyZwX3Byb2RzPSZwX2Nhd X3NIYXJjaF90eXBIPWFuc3dlcnMuc2VhcmNoX25s&p li=&p topview =1)*.

I have reproduced, however, the entire answer below, with relevant passages highlighted. My reading of this suggests that, under these regulations, Ms. Maier would not have been allowed by **HIPAA** to even acknowledge the woman's presence without her permission. By the way, Ms. Maier, as well as the hospital itself, are "covered entities". (Note: PHI is an acronym for "Protected Health Information" - PHI includes any information about a patient that would result in some chance that the patient could be specifically identified such as name, address, social security number, etc.)

The Privacy Rule is balanced to protect an individual's privacy while allowing important law enforcement functions to continue. The Rule permits covered entities to disclose protected health information (PHI) to law enforcement officials, without the individual's written authorization, under specific circumstances summarized below. For a complete understanding of the conditions and requirements for these disclosures, please review the exact regulatory text at the citations provided. Disclosures for law enforcement purposes are permitted as follows:

• To comply with a court order or court-ordered warrant, a subpoena or summons issued by a judicial officer, or a grand jury subpoena. The Rule recognizes that the legal process in obtaining a court order and the secrecy of the grand jury process provides protections for the individual's private information (45 CFR 164.512(f)(1)(ii)(A)-(B)).

• To respond to an administrative request, such as an administrative subpoena or investigative demand or other written request from a law enforcement official. Because an administrative request may be made without judicial involvement, the Rule requires all administrative requests to include or be accompanied by a written statement that the information requested is relevant and material, specific and limited in scope, and de-identified information cannot be used (45 CFR 164.512(f)(1)(ii)(C)).

• To respond to a request for PHI for purposes of identifying or locating a suspect, fugitive, material witness or missing person; but the covered entity must limit disclosures of PHI to name and address, date and place of birth, social security number, ABO blood type and rh factor, type of injury, date and time of treatment, date and time of death, and a description of distinguishing physical characteristics. Other information related to the individual's DNA, dental records, body fluid or tissue typing, samples, or analysis cannot be disclosed under this provision, but may be disclosed in response to a court order, warrant, or written administrative request (45 CFR 164.512(f)(2)).

• This same limited information may be reported to law enforcement:

• About a suspected perpetrator of a crime when the report is made by the victim who is a member of the covered entity's workforce (45 CFR 164.502(j)(2));

• To identify or apprehend an individual who has admitted participation in a violent crime that the covered entity reasonably believes may have caused serious physical harm to a victim, provided that the admission was not made in the course of or based on the individual's request for therapy, counseling, or treatment related to the propensity to commit this type of violent act (45 CFR 164.512(j)(1)(ii)(A), (j)(2)-(3)).

• To respond to a request for PHI about a victim of a crime, and the victim agrees. If, because of an emergency or the person's incapacity, the individual cannot agree, the covered entity may disclose the PHI if law enforcement officials represent that the PHI is not intended to be used against the victim, is needed to determine whether another person broke the law, the investigation would be materially and adversely affected by waiting until the victim could agree, and the covered entity believes in its professional judgment that doing so is in the best interests of the individual whose information is requested (45 CFR 164.512(f)(3)).

• Where child abuse victims or adult victims of abuse, neglect or domestic violence are concerned, other provisions of the Rule apply:

?? *Child abuse or neglect may be reported to any law enforcement official authorized by law to receive such reports and the agreement of the individual is not required (45 CFR 164.512(b)(1)(H)).*

?? *Adult abuse, neglect, or domestic violence may be reported to a law enforcement official authorized by law to receive such reports (45 CFR 164.512(c)):*

• If the individual agrees;

If the report is required by law [There is no mandate in Louisiana for asocial worker or other health professional to report domestic violence unless the victim is a child or medically/psychologically infirmed]; or

• If expressly authorized by law, and based on the exercise of professional judgment, the report is necessary to prevent serious harm to the individual or others, or in certain other emergency situations (see 45 CFR 164.512(c)(l)(iii)(B)).

?? *Notice to the individual of the report may be required (see 45 CFR 164.512(c)(2)).*

• To report PHI to law enforcement when required by law to do so (45 CFR 164.512(f)(l)(i)). For example, state laws commonly require health care providers to report incidents of gunshot or stab wounds, or other violent injuries; and the Rule permits disclosures of PHI as necessary to comply with these laws.

• To alert law enforcement to the death of the individual, when there is a suspicion that death resulted from criminal conduct (45 CFR 164.512(f)(4)).

• Information about a decedent may also be shared with medical examiners or coroners to assist them in identifying the decedent, determining the cause of death, or to carry out their other authorized duties (45 CFR 164.512(g)(1)).

• To report PHI that the covered entity in good faith believes to be evidence of a crime that occurred on the covered entity's premises (45 CFR 164.512(f)(5)).

• When responding to an off-site medical emergency, as necessary to alert law enforcement about criminal activity, specifically, the commission and nature of the crime, the location of the crime or any victims, and the identity, description, and location of the perpetrator of the crime (45 CFR 164.512(f)(6)). This provision does not apply if the covered health care provider believes that the individual in need of the emergency medical care is the victim of abuse, neglect or domestic violence; see above Adult abuse, neglect, or domestic violence for when reports to law enforcement are allowed under 45 CFR 164.512(c).

• When consistent with applicable law and ethical standards:

• To a law enforcement official reasonably able to prevent or lessen a serious and imminent threat to the health or safety of an individual or the public (45 CFR 164.512(j)(1)(i)); or

• To identify or apprehend an individual who appears to have escaped from lawful custody (45 CFR 164.512(j)(1)(ii)(B)).

• For certain other specialized governmental law enforcement purposes, such as:

• To federal officials authorized to conduct intelligence, counter-intelligence, and other national security activities under the National Security Act (45 CFR 164.512(k)(2)) or to provide protective services to the President and others and conduct related investigations (45 CFR 164.512(k)(3));

• To respond to a request for PHI by a correctional institution or a law enforcement official having lawful custody of an inmate or others if they represent such PHI is needed to provide health care to the individual; for the health and safety of the individual, other inmates, officers or employees of or others at a correctional institution or responsible for the transporting or transferring inmates; or for the administration and maintenance of the safety, security, and good order of the correctional facility, including law enforcement on the premises of the facility (45 CFR 164.512(k)(5)).

*Except when required by law, the disclosures to law enforcement summarized above are subject to a minimum necessary determination by the covered entity (45 CFR 164.502(b), **164**.**514**(d)). When reasonable to do so, the covered entity may rely upon the representations of the law enforcement official (as a public officer) as to what information is the minimum necessary for their lawful purpose (45 CFR **164**.**514**(d)(3)(iii)(A)). Moreover, if the law enforcement official making the request for information is not known to the covered entity, the covered entity must verify the identity and authority of such person prior to disclosing the information (45 CFR **164**.**514**(h)).*

It occurs to me that the HIP AA privacy guidelines emerged specifically out of a U. S. Supreme Court case (Jaffee v Redmond). In this case, a social worker sought to protect the confidentiality of her client, a police officer who sought therapy after having shot and killed an alleged perpetrator during the commission of a crime. In this case, the court affirmed that privileged communication exists between a social worker and his/her client. The language was very strong in affirming the need for such a privilege. While I know that this case does not involve issues relating to “privilege”, the language offered in the court's decision may be helpful.

The Court of Appeals for the Seventh Circuit reversed and remanded for a new trial. Addressing the issue for the first time, the court concluded that “reason and experience,” the touchstones for acceptance of a privilege under Rule 501 of the Federal Rules of Evidence, compelled recognition of a psychotherapist patient privilege. ??3?? 51 F. 3d 1346,1355 (1995). “Reason tells us that psychotherapists and patients share a unique relationship, in which the ability to communicate freely without the fear of public disclosure is the key to successful treatment.” Id., at 1355-1356. As to experience, the court observed that all 50 States have adopted some form of the psychotherapist patient privilege. Id., at 1356. The court attached particular significance to the fact that Illinois law expressly extends such a privilege to social workers like Karen Beyer. ??4?? Id, at 1357. The court also noted that, with one exception, the federal decisions rejecting the privilege were more than five years old and that the “need and demand for counseling services has skyrocketed during the past several years.” Id., at 1355-1356.

The Court of Appeals qualified its recognition of the privilege by stating that it would not apply if “in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counseling sessions outweighs that patient's privacy interests.” Id, at 1357. Balancing those conflicting interests, the court observed, on the one hand, that the evidentiary need for the contents of the confidential conversations was diminished in this case because there were numerous eyewitnesses to the shooting, and, on the other hand, that Officer Redmond's privacy interests were substantial. ??5?? Id., at 1358. Based on this assessment, the court concluded that the trial court had erred by refusing to afford protection to the confidential communications between Redmond and Beyer.

Like the spousal and attorney client privileges, the psychotherapist patient privilege is "rooted in the imperative need for confidence and trust. " Trammel, 445 U. S., at 51. Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, 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. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment. ??9?? As the Judicial Conference Advisory Committee observed in 1972 when it recommended that Congress recognize a psychotherapist privilege as part of the Proposed Federal Rules of Evidence, a psychiatrist's ability to help her patients

"is completely dependent upon [the patients'] willingness and ability to talk freely. This makes it difficult if not impossible for [a psychiatrist] to function without being able to assure ... patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule .... there is wide agreement that confidentiality is a sine qua non for successful psychiatric treatment." Advisory Committee's Notes to Proposed Rules, 56 F. R. D. 183, 242 (1972) (quoting Group for Advancement of Psychiatry, Report No. 45, Confidentiality and Privileged Communication in the Practice of Psychiatry 92 (June 1960)).

By protecting confidential communications between a psychotherapist and her patient from involuntary disclosure, the proposed privilege thus serves important private interests.

If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation. Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access--for example, admissions against interest by a party--is unlikely to come into being. This unspoken "evidence" will therefore serve no greater truth seeking function than if it had been spoken and privileged.

That it is appropriate for the federal courts to recognize a psychotherapist privilege under Rule 501 is confirmed by the fact that all 50 States and the District of Columbia have enacted into ?? some form of psychotherapist privilege. ?? We have previously observed that the policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one. See Trammel, 445 U. S., at 48-50; United States v. Gillock, 445 U.S. 360. 368, n. 8 (1980). Because state legislatures are fully aware of the need to protect the integrity of the factfinding functions of their courts, the existence of a consensus among the States indicates that "reason and experience" support recognition of the privilege. In addition, given the importance of the patient's understanding that her communications with her therapist will not be publicly disclosed, any State's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court. ?? Denial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications.

Because we agree with the judgment of the state legislatures and the Advisory Committee that a psychotherapist patient privilege will serve a "public good transcending the normally predominant principle of utilizing alt rational means for ascertaining truth," Trammel, 445 U. S., at 50, we hold that confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence. ??

All agree that a psychotherapist privilege covers confidential communications made to licensed psychiatrists and psychologists. We have no hesitation in concluding in this case that the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy. The reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker such as Karen Beyer. ?? Today, social workers provide a significant amount of mental health treatment. See, e.g., U. S. Dept. of Health and Human Services,

Center for Mental Health Services, Mental Health, United States, 1994 pp. 85-87, 107-114; Brief for National Association of Social Workers et al as Amici Curiae 5-7 (citing authorities). Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, id, at 6-7 (citing authorities), but whose counseling sessions serve the same public goals. ?? Perhaps in recognition of these circumstances, the vast majority of States explicitly extend a testimonial privilege to licensed social workers. ?? We therefore agree with the Court of Appeals that "[d]rawing a distinction between the counseling provided by cosily psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose." 51 F. 3d, at 1358, n. 19.

We part company with the Court of Appeals on a separate point. We reject the balancing component of the privilege implemented by that court and a small number of States. ?? Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. As we explained in Upjohn, if the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions wilt be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better. than no privilege at all." 449 U. S., at 393.

Please note the implication of this decision. The court recognized that the "privacy" between a social worker and his/her client was so important that it took away discretion from the judge, suggesting that the privilege was so strong the court could not effect a "balancing test" by reviewing information *in camera* and weighing probative vs. prejudicial import. As stated above, besides **HIPAA** regulations, Liz should also have been guided by her licensing law. The "Professional and Occupational Standards" for Louisiana Social Workers can be found at the following site:

http://www.labs we. or g/rules.pdf

Chapter 1, Section 115 addressed confidentiality and reads as follows:

115. Client confidentiality.

A. Written informed consent.

A social worker shall protect all information provided by or obtained about a client. Information or electronic. Except as provided herein, client information may be disclosed or released only with the client's written informed consent. The written informed consent shall explain to whom the client's information will be disclosed or released and the purpose and time frame for the release of information,

B. Release of client information without written consent. A social worker may disclose client information without the client's written consent only under the following circumstances:

1. Where required by federal or state law, including mandatory reporting laws, requiring release of client information;

2. Where the treating social worker has made a clinical judgment that a client has communicated a significant threat of physical violence against an identifiable victim(s), with the apparent intent and ability to carry out the threat. In such case, the social worker has a duty to warn which is discharged by reasonable efforts to communicate the threat to the potential victim(s) and to notify law enforcement authorities in the vicinity of the client and the victim(s). See La. R.S. 9:2800.2.

3. Where one of the enumerated exceptions to the healthcare provider - patient privilege, as specified in Article 510 of the La. Code of Evidence is applicable and the social worker is being required to give testimony at trial (hearing) or at a legally authorized deposition. See Article 510(E) of the La. Code of Evidence.

4. Where the social worker is the subject of a malpractice or professional negligence claim relating to a client or former client who is claiming damage or injury; the social worker may provide such information that is directly and specifically related to the factual issues pertaining to the social worker's alleged liability. However, in such a case, information concerning the client's current treatment or condition may only be disclosed pursuant to testimony at trial or legally authorized discovery methods. See Article 510(F) of the La. Code of Evidence.

5. Where the social worker is required to address allegations of a complaint brought by a client or former client which are the subject of adjudication or disciplinary hearing involving the social worker.

6. Where the Louisiana State Board of Social Work Examiners issues a lawful subpoena to a social worker and the Board provides adequate safeguards to maintain confidentiality of client information or identify such as prescribed in La. R.S. 13:3715.1(1).

C. Release of client records without written consent.

A social worker may release client records without the client's written consent under the following circumstances:

1. Where a client's authorized representative consents in writing to the release;

2. Where mandated by the federal or state law requiring release of records;

3. Where circumstances described in Rule 115.B. and Rule 115.B. 4. apply and the social worker is lawfully issued and served with a subpoena duce tecum which complies with the formalities prescribed in La. R.S. 13:3715.1.9

4. Where the circumstances described in Rule 115.B.5. and Rule 115.C.6. apply and the social worker received a lawfully issued subpoena from the Louisiana State Board of Social Work Examiners.

D. Limits of confidentiality.

The social worker shall inform the client of the limits of confidentiality as provided under applicable law. Confidentiality limits shall include, but are not limited to, the following situations:

1. Where circumstances giving rise to the list of exceptions to the healthcare provider-patient privilege listed in the La. Code of Evidence Article 510.

2. Where communications to the social worker reveal abuse or neglect of children and elders which impose an obligation on social workers as mandatory reporters under the Louisiana Children's Code Article 609 La. R.S. 14:403, and La. R.S. 14:403.2.
3. Where communications to the social worker relate to abuse or

neglect of residents of healthcare facilities which impose duty to report under La. R.S. 40:2009.20.

4. Where the social worker has a duty to warn in relation to communications of threats of physical violence under La R.S. 9:2800.2.

5. Where the social worker has been appointed to conduct an evaluation for child custody or visitation by the court or where prior communications to the social worker relate to the health conditions of a client(s) who are parties to proceedings or custody or visitation of a child and the condition has substantial bearing on the fitness of the person claiming custody or visitation.

Of course, none of the exceptions to privilege would apply in this instance In the first place, this is not a “privilege” situation. Secondarily, most of the exceptions to privilege involve the client “voluntarily” making their mental status an issue in a legal

proceeding - the client obviously did not want her identity revealed. The other exceptions involve child protection, protection of the infirmed, imminent dangerousness, malpractice, etc. None of those reasons apply in this case.

In a similar vein, Ms. Maier is presumably a member of the National Association of Social Workers. NASWs ethical guidelines contain similar language about a social worker's responsibilities regarding confidentiality. Section 1.07 of the Ethical Code can be found at this web site:

(*http://www.socialworkers.org/pubs/code/code.asp*)

It reads as follows:

1.07 Privacy and Confidentiality

(a) Social workers should respect clients' right to privacy. Social workers should not solicit private information from clients unless it is essential to providing services or conducting social work evaluation or research. Once private information is shared, standards of confidentiality apply.

(b) Social workers may disclose confidential information when appropriate with valid consent from a client or a person legally authorized to consent on behalf of a client.

(c) Social workers should protect the confidentiality of all information obtained in the course of professional service, except for compelling professional reasons. The general expectation that social workers wilt keep information confidential does not apply when disclosure is necessary to prevent serious, foreseeable, and imminent harm to a client or other identifiable person. In all instances, social workers should disclose the least amount of confidential information necessary to achieve the desired purpose; only information that is directly relevant to the purpose for which the disclosure is made should be revealed.

(d) Social workers should inform clients, to the extent possible, about the disclosure of confidential information and the potential consequences, when feasible before the disclosure is made. This applies whether social workers disclose confidential information on the basis of a legal requirement or client consent.

(e) Social workers should discuss with clients and other interested parties the nature of confidentiality and limitations of clients' right to confidentiality. Social workers should review with clients circumstances where confidential information may be requested and where disclosure of confidential information may be legally required. This discussion should occur as soon as possible in the social worker-client relationship and as needed throughout the course of the relationship.

(f) When social workers provide counseling services to families, couples, or groups, social workers should seek agreement among the parties involved concerning each individual's right to confidentiality and obligation to preserve the confidentiality of information shared by others. Social workers should inform participants in family, couples, or group counseling that social workers cannot guarantee that all participants will honor such agreements,

(g) Social workers should inform clients involved in family, couples, marital, or group counseling of the social worker's, employer's, and ‘ agency's policy concerning the social worker's disclosure of confidential information among the parties involved in the counseling.

(h) Social workers should not disclose confidential information to third-party payers unless clients have authorized such disclosure.

(i) Social workers should not discuss confidential information in any setting unless privacy can be ensured. Social workers should not discuss confidential information in public or semipublic areas such as hallways, waiting rooms, elevators, and restaurants.

(j) Social workers should protect the confidentiality of clients during legal proceedings to the extent permitted by law. When a court of law or other legally authorized body orders social workers to disclose confidential or privileged information without a client's consent and such disclosure could cause harm to the client, social workers should request that the court withdraw the order or limit the order as narrowly as possible or maintain the records under seal, unavailable for public inspection.

(k) Social workers should protect the confidentiality of clients when responding to requests From members of the media.

(l) Social workers should protect the confidentiality of clients' written and electronic records and other sensitive information. Social workers should take reasonable steps to ensure that clients' records are stored in a secure location and that clients' records are not available to others who are not authorized to have access.

(m) Social workers should take precautions to ensure and maintain the confidentiality of information transmitted to other parties through the use of computers, electronic mail, facsimile machines, telephones and telephone answering machines, and other electronic or computer technology. Disclosure of identifying information should be avoided whenever possible.

(n) Social workers should transfer or dispose of clients' records in a manner that protects clients' confidentiality and is consistent with state statutes governing records and social work licensure.

(o) Social workers should take reasonable precautions to protect client confidentiality in the event of the social worker's termination of practice, incapacitation, or death.

(p) Social workers should not disclose identifying information when discussing clients for teaching or training purposes unless the client has consented to disclosure of confidential information.

(q) Social workers should not disclose identifying information when discussing clients with consultants unless the client has consented to disclosure of confidential information or there is a compelling need for such disclosure,

(r) Social workers should protect the confidentiality of deceased clients consistent with the preceding standards.

I apologize for the length of this letter, but Liz was brave and exquisitely professional in refusing the request of the police officer and seeing this matter through to this conclusion. If I can help you in any other way, please do not hesitate to contact me.

By the way, you asked about billing for this consultation. I'm not sure what arrangement you made with my office manager. This letter required about four hours of my time. I bill consultation time, such as this, at the rate of $150.00/hr. As a consequence, the total billing for this consultation is $600.00. I believe we sent a fee schedule to you so that you can be aware of any additional billing that may be incurred.