UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In the matter of a subpoena
Issued in the case of

NATIONAL ABORTION FEDERATION, et al.	)	
	)	
Plaintiffs,	)	
	)	**No. 04-70658**
v.	)	**Hon. Avern Cohn**
	)	
JOHN ASHCROFT,	)	
	)	**Filed in Conjunction with:**
Defendant	)	**03 Civ. 8695 (RCC), (S.D.N.Y.)**
	)	
UNIVERSITY OF MICHIGAN HEALTH SYSTEM,	)	
	)	
Movant.	)	

THE UNIVERSITY OF MICHIGAN HEALTH SYSTEMS' REPLY BRIEF IN SUPPORT OF ITS PETITION TO QUASH SUBPOENA

SULLIVAN, WARD, BONE, TYLER & ASHER, P.C.

SULLIVAN, WARD, BONE, TYLER & ASHER, P.C.

I. INTRODUCTION

In the case of NAF v Ashcroft, the Attorney General has issued a subpoena seeking patient medical information from the University of Michigan Health System ("UMHS"). UMHS has argued that the subpoena of UMHS patients' medical information should be quashed and has filed a Petition requesting the same. The UMHS is not a Plaintiff in this action and has only advocated for the privacy rights of its patients' medical information; it has not taken a position as to any of the underlying issues in the case. Federal and state law prevents the UMHS from producing the requested information, even if the names and other identifying information are redacted. Through HIPAA's anti-preemption provision, Congress requires as a matter of federal law, that the Court apply the privacy protections of Michigan law. This was communicated to the Attorney General by UMHS through multiple correspondences before the original Petition to Quash was filed.

Three assertions dominate the Attorney General's response ("AG. Mem."). First, the Attorney General has stated that federal common law rules of privilege, and not HIPAA, apply in this type of litigation. However, as demonstrated below, HIPAA, not Federal Rule of Evidence 501, governs how individually identifiable health information, such as medical records, should be kept private and, pursuant to HIPAA, Michigan's stricter privacy law controls.

Second, the Attorney General repeatedly asserts that they need the medical information because of their alleged relevance and to test the assertions of Plaintiff Dr. Timothy A. Johnson. As Section B below shows, the Attorney General's argument is unpersuasive. The Attorney General does not respond to the UMHS' detailed discussion showing that the records will be useless for this purpose, and that the Attorney General can test the "assertions" of by the usual methods employed in American Courtrooms.

Third, the Attorney General responds that UMHS' assertion of undue burden has no basis in fact or law and should be rejected. The Attorney General ignores the fact that UMHS does not compile records in a fashion demanded by the Attorney General's subpoena. Medical information is not categorized by procedure performed and would require reviewing every UMHS patient's medical record to seek out the requested information, a HIPAA violation, in and of itself.

SULLIVAN, WARD, BONE, TYLER & ASHER, P.C.

II. ARGUMENT

B. HIPAA REQUIRES THAT MICHIGAN'S MORE STRINGENT PRIVACY RULE BE APPLIED

The Attorney General has argued that because NAF is a federal case that applies federal law, FRE 501 dictates that Michigan's strict privacy laws should be trumped by federal common law, which does not recognize a physician-patient privilege. The Attorney General relies on FRE 501 to invalidate Michigan's privacy laws which states:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Under the proposition that there does not exist a federal common law physician-patient privilege, the Attorney General cites a litany of cases beginning with Memorial Hospital for McHenry County v. Shadur, 664 F.2d 1058 (7th Cir. 1981), where federal courts have relied on the Supremacy Clause and Federal Rule of Evidence 501 to hold that state privilege laws cannot be used to hinder discovery in cases governed by federal law. All but one of the cases cited by the Attorney General either predate April 14, 2003, the date when the HIPAA regulations became effective, or deal with privileges that are outside HIPAA's scope.[1] As stated by Chief District Judge Kocoras in the Northwestern

[1] The only case cited by the Attorney General for their view of the HIPAA anti-preemption provision, A Helping Hand, LLC v Baltimore County, 295 F. Supp 2d 585 (Dist. of Md. 2003). The Government in A Helping Hand, sought the medical records of a drug and rehabilitation clinic, to determine if the patients were disabled under the terms of the Americans with Disabilities Act ("ADA") in defending a case brought by the clinic for not allowing them to locate a clinic in the county. The lawsuit alleged violations of the ADA and constitutional violations. While the Judge opined that federal law applies and not state law, there is no citation to the Maryland law offered and whether that law was as stringent as Michigan law and whether it had the teeth to preempt HIPAA. Further, the Court held "it is not clear that the defendants will need individual patient data to defend against the suit," and that the Government could glean the information through other generalized methods. Id. at 592.

SULLIVAN, WARD, BONE, TYLER & ASHER, P.C.

decision: "[b]ecause the authorities cited by the Attorney General do not contemplate HIPAA, they cannot be read in a vacuum." Nat'l Abortion Fed'n v. Ashcroft, 2004 U.S. Dist. LEXIS 1701 (U.S. Dist., 2004).

Federal Rule of Evidence 501 does state that evidentiary privileges should be governed by federal common law, but only "except as otherwise . . . provided by Act of Congress." Id.[2] For this reason, HIPAA and the regulations promulgated thereunder, not FRE 501, control the protections provided to patient medical information held by hospitals. Id. "If the case were otherwise, Congress' directive to the Secretary of Health and Human Services to set standards and regulations 'with respect to the privacy of individually identifiable health information,' (HIPAA, Pub. L.No. 104-191, §264(a), 110 Stat. 1936 (1996)), would be rendered meaningless in a regime where Federal Rule of Evidence 501 recognizes no privilege as to such records." Id.

Finally, even if the HIPAA anti-preemption provision did not control the issue in this federal case, the provision would still be relevant to the Shadur analysis. HIPAA's anti-preemption provision expresses a federal policy of respecting the judgments made by States that choose to provide stringent protections to medical records. Given this federal policy, it is hard to argue that Michigan's privilege against disclosure does "substantial harm" to a federal interest.

---

[2] The Attorney General cites p. 65 Fed. Reg. 82596 in defense of his notion that HIPAA was not intended to interfere with federal or state rules that create privileges, such as FRE 501. The page cited by the Attorney General is part of the preamble where the Government responded to actual individual concerns regarding the implementation of HIPAA. Read in its entirety below, it is evident that this Response to an individual commentator serves to strengthen the UMHS' argument:

> ***Comment***: Many comments requested clarification that the privacy regulation does not conflict or interfere with the federal or state privileges. In particular, one of these comments suggested that the final regulation provide that disclosures for purposes recognized by the regulation not constitute a waiver of federal or state privileges.
>
> **(HHS)*Response***: We do not intend for the privacy regulation to interfere with federal or state rules of evidence that create privileges. Consistent with The Uniform Health Care Information Act drafted by the National Conference of Commissioners on Uniform State Laws, we do not view a consent or an authorization as a waiver of federal or state privileges.

This HHS response was written to allay fears of individuals that by signing a consent or authorization regarding their medical records, that they somehow waived their right to privacy in situations such as this. The HHS response was written to bolster the protection of both state and federal privilege and to protect its application, despite consenting or authorizing the release of one's medical records for treatment or other purposes.

SULLIVAN, WARD, BONE, TYLER & ASHER, P.C.

Because HIPAA, not Federal Rule of Evidence 501, governs how individually identifiable health information, such as medical records, should be kept private, Michigan law controls and the Attorney General's subpoena must be quashed.

B. AS A MATTER OF FEDERAL COMMON LAW, JAFFEE SUPPORTS RECOGNIZING THE PHYSICIAN-PATIENT PRIVILEGE IN THIS CASE

In Jaffee v. Redmond, 518 U.S. 1 (1996), the Supreme Court recognized a privilege for confidential communications between physician and patient in the specific context of where the physician is a psychotherapist. As the Hospital's opening brief argued, the present context is another where recognition of the privilege promotes the policies that Jaffee identified as controlling. Moreover, additional considerations not present in Jaffee argue for the privilege here. UMHS Brief. 12-18.

Citing pre-Jaffee cases, the Attorney General responds with the flat assertion that "[t]here is no federal common law physician-patient privilege." AG. Mem. 14. After Jaffee, this assertion is too broad. While federal law does not recognize a general physician-patient privilege, Jaffee plainly requires the Court to decide whether a privilege exists in a particular context.

The Attorney General also appears to claim that courts have repeatedly rejected requests to recognize the privilege on the basis of Jaffee. AG. Mem. 15. He cites no such case. The Hospital knows of no case that has analyzed this issue in light of Jaffee - although scholarly commentary has argued that Jaffee requires federal courts to broaden the physician-patient privilege. *See* UMHS Brief 13.

Beyond these inaccurate generalizations, the Attorney General does not respond to the Hospital's extensive discussion of how the Jaffee factors apply to the present situation. He merely repeats that the redaction of the names from records solves any privacy concerns and renders any physician-patient privilege unneccesary. AG. Mem 15-16.

SULLIVAN, WARD, BONE, TYLER & ASHER, P.C.

C. THE SUBPOENA SHOULD ALSO BE QUASHED BECAUSE IT IS AN "UNDUE BURDEN" ON THE PATIENTS AND THE HOSPITAL

As the UMHS showed, even if these records are not deemed "privileged," F.R.Civ.P. 45(c)(3)(A)(iv) requires the subpoena to be quashed if it would impose an "undue burden on any person." Disclosure, even in redacted form, will place an undue burden on patients. The Hospital has the obligation to tell them of the disclosure. They will know that their private medical information is being circulated in the public arena of litigation and that they are powerless to prevent it. Most will undoubtedly view this situation as a serious invasion of their privacy. And disclosure will damage the Hospital's relationship with its patients. UMHS Brief. 20-21.

In a cursory paragraph, the Attorney General answers that as a matter of law, these consequences cannot be an "undue burden." The Attorney General cites no case, but only an Advisory Committee Note giving an example of an "undue burden." AG. Mem. 18-19. This Note in no way implies that "undue burden" is restricted to the example. As the Hospital's brief pointed out, case law construes this term broadly. UMHS Brief. 20, citing Miscellaneous Docket Matter #1 v. Miscellaneous Docket Matter #2, 197 F.3d 922, 927 (8th Cir. 1999), which found that emotional distress from disclosure could be an "undue burden" within the meaning of the Rule.

The Attorney General's subpoena should be quashed. It seeks records of no substantial help to his defense in NAF v. Ashcroft. But it has undeniable potential to intimidate patients who have undergone or may undergo these procedures and the physicians who have performed or may perform them, and undeniable potential to earn hospitals the enmity of patients. Additionally, Michigan's privacy law makes no exception for redacted records.

SULLIVAN, WARD, BONE, TYLER & ASHER, P.C.

III. CONCLUSION

The UMHS respectfully requests that its Motion To Quash be granted.

Respectfully submitted,

SULLIVAN, WARD, ASHER, & PATTON, P.C.

By: _____

Scott D. Feringa (P 28977)
Michael R. Dorfman (P 60955)
Nicole K. Nugent (P 60218)
Attorneys for UMHS
25800 Northwestern Hwy.
1000 Maccabees Center
Southfield, MI 48075
(248) 746-0700

Dated: March 5, 2004
W0334465.2

SULLIVAN, WARD, BONE, TYLER & ASHER, P.C.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In the matter of a subpoena
Issued in the case of

NATIONAL ABORTION FEDERATION, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
JOHN ASHCROFT,	)	**Filed in Conjunction with:**
	)	**03 Civ. 8695 (RCC), (S.D.N.Y.)**
Defendant	)	
	)	
UNIVERSITY OF MICHIGAN HEALTH SYSTEM,	)	
	)	
Movant.	)	
	)	

PROOF OF SERVICE

ANN M. HURLEY says that on the 5th day of March, 2004, She served a copy of University of Michigan Health System's Reply Brief In Support of its Petition to Quash Subpoena; and Proof of Service on the following individuals via Federal Express Delivery System, all fees and costs prepaid;

Kimberly A. Parker
A. Stephen Hut, Jr.
Wilmer, Cutler & Pickering
2445 M Street N.W.
Washington D.C. 20037

Lorie A. Chaiten
Roger Baldwin Foundation of ACLU, Inc.
180 N. Michigan Ave., Suite 2300
Chicago, IL 60601

Susan Talcott Camp
Julie Stonberg
Reproductive Freedom Product
ACLU Foundation
125 Broad Street
New York, NY 10004

Rebekah Diller
New York Civil Liberties Union
125 Broad Street, 17th Floor
New York, NY 10004

Sheila Gowan
Assistant United States Attorney
33 Whitehall St., 8th Floor
New York, NY 10004

William Woodard, AUSA
U.S. Attorney's Office
211 W. Fort Street, Suite 2001
Detroit, Michigan 48226

Ms. Elizabeth Wolstein
Assistant United States Attorney
86 Chambers Street – 3rd Floor
New York, NY 10007

ANN M. HURLEY

SULLIVAN, WARD, BONE, TYLER & ASHER, P.C.