

Judicial Proceedings Panel
Special Requests for Information – 10 October 2014
Interim U.S. Army Response – 23 October 2014

Request #1: Identify cases in which military judge narrowed scope of cross-examination of victim on prior sexual behavior (see Pages 93-94 of Draft Transcript).

Answer: The Department of the Army does not centrally maintain information concerning cases in which the military judge may have narrowed the scope of cross-examination of a victim concerning prior sexual behavior.

Request #2: Confirm change since 2003 in Army policy regarding access by trial counsel, CID agents, and commanders of mental health records (see Pages 131-32 of Draft Transcript).

Answer:

The Department of the Army has changed its policy since 2003 regarding access to protected health information (PHI) from service treatment records (STR). Current Army policy is promulgated in Army Regulation 40-66, "Medical Services: Medical Record Administration and Healthcare Documentation," dated June 17, 2008 (updated through Rapid Action Revision Jan. 4, 2010), and is available online here: http://www.apd.army.mil/pdf/r40_66.pdf.

The use and disclosure of PHI is now subject to the specific terms and conditions prescribed in the Department of Defense "Health Information Privacy Regulation," which is itself based on the requirements of the Health Insurance Portability and Accountability Act (HIPAA)(Pub. L. 104-191). Department of Defense policy is promulgated in DoD 6025.18-R, "DoD Health Information Privacy Regulation," dated Jan. 24, 2003, and is available online here: <http://www.dtic.mil/whs/directives/corres/pdf/602518r.pdf>.

The updated Army policy also provides more specific guidance than previous policies as to which situations may allow the use or disclosure of PHI to Department of Defense employees who have an official need for access in the performance of their duties. See *generally* Army Reg. 40-66, para. 2-4a(1). As a general matter, such information may not be used or disclosed except for these specifically permitted purposes. The policy also encourages continued coordination with a judge advocate "on all matters pertaining to the request for and disclosure of patient PHI." Army Reg. 40-66, para. 2-5q. As a result, a Soldier's entire medical record is no longer routinely provided to law enforcement personnel for examination as was sometimes the case prior to HIPAA's implementation in 2003. Even if PHI is disclosed, current Army policy provides that Army employees who use PHI for official purposes "must protect the privacy and confidentiality of that information in accordance with law and regulation." Army Reg. 40-66, para. 1-4i.

There is no general exception in the current policy that would allow trial counsel or commanders to access the mental health records of Soldiers without their consent. Covered entities of the military health system may disclose PHI in response to a

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subpoena, discovery request, or other lawful process if certain assurances regarding notice to the individual or a protective order are provided. Such information may also be disclosed in a judicial or administrative proceeding only if the request for information is through an order from a court or administrative tribunal. A covered entity may also use and disclose the PHI of Soldiers for activities deemed necessary by appropriate military command authorities to assure the proper execution of the military mission, such as determining a Soldier's fitness to perform any duty, order, or assignment. 45 C.F.R. §164.512(k)(1); Army Reg. 40-66, para. 2-4a.(1)(k).

Access to mental health records by law enforcement may ordinarily be granted in six circumstances and is subject to specified conditions:

- (1) when required by law (including court orders, court-ordered warrants, subpoenas) and administrative requests;
- (2) to identify or locate a suspect, fugitive, material witness, or missing person;
- (3) in response to a law enforcement official's request for information about a victim or suspected victim of a crime;
- (4) to alert law enforcement of a person's death, if the covered entity suspects that criminal activity caused the death;
- (5) when a covered entity believes that protected health information is evidence of a crime that occurred on its premises; and
- (6) by a covered health care provider in a medical emergency not occurring on its premises, when necessary to inform law enforcement about the commission and nature of a crime, the location of the crime or crime victims, and the perpetrator of the crime.

A law enforcement official who requests disclosure of PHI must make the request in writing, make it specific and limited in scope, and limit the request to PHI that is relevant and material to legitimate law enforcement inquiry. See DoD 6025.18-R, para. C7.6.1.2.3. Only enough information will be provided to satisfy the request. Army Reg. 40-66, para. 2-2f. The U.S. Army Medical Command reports that generic requests not limited by time or subject-matter will typically not be honored by medical records custodians.

Psychotherapy notes are subject to additional limitations under military privacy policy. Psychotherapy notes include notes recorded (in any medium) by a healthcare provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record.

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Psychotherapy notes exclude medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: diagnosis, functional status, treatment plan, symptoms, prognosis, and progress to date.

The patient must personally authorize the release or use of psychotherapy notes unless the disclosure is necessary to carry out treatment, training, defensive litigation, healthcare operations, avert a serious and imminent threat to the health or safety of a person or the public, or is otherwise required by law.

"Required by law" includes, but is not limited to, court orders and court-ordered warrants; subpoenas or summons issued by a court, grand jury, an inspector general, or an administrative body authorized to require the production of information; an authorized investigative demand; and statutes or regulations that require the production of information.

Army policy has long recognized that "[n]onmedical personnel may need information from a person's STR for official reasons." Army Reg. 40-66, para. 5-23e. However, current policy conditions any need for access by nonmedical personnel to PHI with the countervailing mandate that the confidentiality of PHI will be safeguarded to the fullest extent possible. PHI will be disclosed only if authorized by law and regulation. Army Reg. 40-66, para. 2-2.