Judicial Proceedings Panel
Confidentiality and Privilege
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Introduction

Good afternoon. Thank you to the Judicial Proceedings Panel for extending an invitation to testify regarding the psychotherapist-patient privilege and the use of, and the *ramifications* of the use of, a victim's mental health records in criminal legal proceedings, specifically in sexual assault cases – as such cases are often where these privileges are challenged and, thus, may have the most significant impact.

I was asked to include testimony on general information regarding the laws; how the privilege is addressed by prosecutors, defense attorneys, and the courts; and how requests to seek mental health records and except the privilege, and the granting of those requests, can impact a victim and a case. Fundamentally, the military's rule governing the psychotherapist-patient privilege is similar to others around the country. Issues arise and problems persist in the military system just as they do in the civilian world – less because of the rules themselves, and more so because of their application (or misapplication) by attorneys and judges.

Confidentiality and Privilege

Confidentiality laws encourage open, honest, and safe communication between victims and the professionals they rely on to support their healing and pursuit of justice. These services, provided in a compassionate and secure setting, may be necessary to meet sexual (or domestic) violence victims' legal, medical, mental health, counseling, housing, and financial needs. Confidentiality is the foundation upon which victims rebuild trust, empowerment, and autonomy after their diminishment or destruction following acts of violence.[1]

While confidentiality is a *duty*, a privilege is a *legal right* that gives both the sharer and the holder of information special protection to refuse to disclose privileged communications within the confines of certain relationships. These privileges provide a protective veil, behind which clients can speak truthfully about personal and often-painful details to trusted *professionals* without fear that their most personal thoughts will be revealed.

The Laws Generally

In recognition of the benefits of these privileged relationships, communications between individuals in protected relationships are essentially elevated over the public's desire to obtain this information. It is the "right of privacy" – the right of a person to be free from unwarranted public scrutiny or exposure – and the desire to help individuals and members of society, that has led to the development of professional privileges including

[1] *See generally* Leslie Hagan, *Communications and Violence Against Women: Michigan Law on Privilege, Confidentiality, and Mandatory Reporting*, 17 T. M. COOLEY L. REV. 183 (2000); *see generally* Kimberly A. Tolhurst, *Confidentiality: Sexual Assault and the Healthcare System*, BATTERED WOMAN'S JUSTICE PROJECT (2005), http://www.docstoc.com/docs/83089364/Sexual-Assault-and-the-Healthcare-System (last visited Oct. 17, 2014).

that of the psychotherapist-patient.[2] All 50 states recognize some form of the psychotherapist-patient privilege encompassing communications between a patient and his/her psychiatrist, clinical psychologist, or clinical social worker.[3] The federal rule contains *all* privileges comprehensively in FRE 501.

While these rules are generally similar to MRE 513, two notable differences exist.[4] **First**, MRE 513 includes procedures in the rule itself (section (e), for example, specifies that the request must be in writing and specifies the time by which the request must be filed). While most jurisdictions *do* require a written motion by the defendant seeking discovery of the privileged records, few jurisdictions have outlined that procedure, while the military rule provides it in detail.

Second, MRE 513 includes the exception: "when admission or disclosure of a communication is constitutionally required" (section (d)(8)).[5,6] No state rules of evidence that cover the psychotherapist-patient privilege *specifically* include a "constitutionally required" exception. The scope of those rules, in the context of what is constitutional, is discussed in advisory and other opinions. MRE 513's inclusion of this exception,

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[2] Privileges can be categorized in one of three ways: (1) *absolute:* meaning that communications arising out of the protected relationship are privileged, unless the privilege holder waives the privilege, and the statutes contain no language providing for *in camera* review of the relevant records; (2) *semi-absolute:* meaning that the communications are privileged unless voided by public interest exceptions, such as those in child abuse cases; or (3) *qualified:* meaning that there is limited protection for the privileged communication such that a judge can hold an *in camera* review of privileged records, and then the judge can apply a balancing test to determine whether the information can be released. Viktoria Kristiansson, *Walking a Tight Rope: Balancing Victim Privacy Over Offender Accountability in Domestic Violence and Sexual Assault Prosecutions*, 10 Strategies 2 (May 2013), *available at* http://www.aequitasresource.org/library.cfm; *see* Loretta Frederick, *Confidentiality and Information Sharing Concerns for Advocates*, *available at* http://www.mcbw.org/files/u1/confidentiality.pdf; *The Laws in your State,* RAPE, ABUSE & INCEST NATIONAL NETWORK (RAINN), http://rainn.org/public-policy/laws-in-your-state (last visited Oct.17, 2014). Even when the four corners of a statute indicate that the privilege is absolute, a review of current case law is necessary to determine if courts may have allowed *in camera* review of records on constitutional due process and confrontation grounds.

[3] Twelve states provide for a psychotherapist-patient privilege with *in camera* review: Arizona, Kentucky, **Maine**, **New York**, **North Carolina**, **North Dakota**, Ohio, **Oklahoma**, **Rhode Island**, Tennessee, Washington, Wyoming; the six bolded states are mandatorily private, meaning that only the judge reviews them.

[4] "MRE 513 provides that a military judge 'shall examine the evidence or a proffer thereof *in camera*, if such examination is necessary to rule on the motion' requesting production of the confidential information." *Psychotherapist-Patient Privilege in the Military*, NATIONAL ASSOCIATION OF SOCIAL WORKERS, http://www.socialworkers.org/ldf/legal_issue/200507.asp?back=yes&print=1 (last visited Oct. 16, 2014. In some jurisdictions, statutes call for judicial *in camera* review to decide whether privileged communications should be revealed. In such cases, prosecutors should carefully prepare to defend the privilege and argue that the victim's privacy is supported by statute and case law.

[5] A snapshot of the permitted exceptions to this privilege in the **states** includes: proceedings to hospitalize a patient; breach of duty arising out of the counselor-patient relationship; reporting child abuse or neglect or elder abuse; reporting a patient who is about to commit a crime; incapacitation of a patient; death of the patient; the patient's commission of perjury; probative value outweighs prejudice, which often also includes an *in camera* records review or hearing, and/or a showing by the defense; and prior written consent of the patient/victim.

[6] The military court's analysis of "constitutionally required" evidence indicates that "even relevant evidence remains subject to an MRE 403 balancing test before it can be deemed constitutionally required, and "[d]etermining whether evidence is constitutionally required demands a contextual analysis and balancing of interests such as the probative value; the right to expose a witness' motive to testify; the danger of harassment, prejudice, or confusion of the issues; the witness' safety; and whether the evidence may be only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431 (1986). "Whether evidence is 'constitutionally required to be admitted' is reviewed on a case-by-case basis." United States v. Buenaventura, 45 MJ 72, 79 (1996). Relevance is the key determinant, and defense must establish the foundation showing the evidence has constitutionally-required relevance. United States v. Jensen, 25 MJ 284, 286 (C.M.A. 1987); United States v. Moulton, 47 MJ 227, 229 (1997). Defense also must reasonably establish that the records are likely to contain material information necessary to the defense. Once the military judge has determined that the proffered evidence is relevant and material, the judge then applies the MRE 412 balancing test – balancing the probative value of the evidence against the danger of unfair prejudice – and considers factors such as confusion of the issues, misleading factfinders, undue delay, waste of time, needless presentation of cumulative evidence, and prejudice to the victim's legitimate privacy interests. United States v. Banker, 60 MJ 216, 223 (C.A.A.F. 2004). Factors such as the danger of "harassment … [and] the witness' safety" should also be considered. *Van Arsdall,* 475 U.S. at 679.

therefore, implies something *more* than the traditional 403 balancing test.[7]

Several **state courts** have upheld the psychotherapist-patient privilege on a range of grounds. Where a defendant fails to allege a particularized need for privileged records, (s)he is not entitled to *in camera* review.[8] "[A] vague assertion that the victim *may* have made statements to her therapist that *might possibly* differ from the victim's anticipated trial testimony does *not* provide a sufficient basis to justify ignoring the victim's right to rely upon her statutory privilege."[9] Without the showing of a particularized need, a trial court's refusal to conduct an *in camera* hearing to examine communications does **not** violate the defendant's due process rights or his/her confrontation rights.[10] Further, the state court opinions have noted that the psychotherapist-patient privilege only limits access to statements made during the course of treatment. It does not foreclose all lines of defense questioning. It does not place the defense in a disadvantageous position, as neither the defense nor the prosecution have access to the privileged files.[11] In weighing the public interests protected by shielding the file with those advanced by disclosure, many courts have concluded that the balance tips in favor of non-disclosure.

The **federal** rule encompassed in FRE 501 addresses the reach of the privilege on a case-by-case basis.[12] Cases that have permitted *in camera* production of records have done so under circumstances of note – for example, when a child victim disclosed sexual abuse to a psychologist, who reported the abuse to authorities,[13] or where the defendant's constitutional right to prepare and cross-examine a witness was at issue, *e.g.*, financial motivations for witness's testimony.[14] Historically, the Court has supported the victim's right to be free from

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[7] In analyzing this *something more*, my colleagues at AEquitas and I were reminded of the "plus one" requirement for charging sexual assault cases that exists in some jurisdictions. In those jurisdictions, independent evidence corroborating the assault is required prior to charging a sexual offender. Such a requirement is contrary to what the research and anecdotal evidence show about sexual assault and its reporting; it is a crime that occurs in the absence of other eyewitnesses and its victims often delay or do not report due to many factors related to the trauma of the assault and its aftermath. By including the "constitutionally required" exception, many will interpret it as a catch-all or an additional/different exception, causing judges to waver and view the rule as less inviolable than it actually is.

[8] People v. Stanaway, 521 N.W.2d 557 (Mich. 1994). The Michigan rule is that where a defendant can establish a reasonable probability that privileged records of a psychologist, sexual assault counselor, social worker, or juvenile diversion officer are likely to contain material information necessary to the defense, *in camera* review of those records must be conducted to ascertain whether they contain evidence that is reasonably necessary to the defense.

[9] People v. District Court, 719 P.2d 722, 726 (Colo. 1986).

[10] People v. Foggy, 521 N.E.2d 86 (Ill. 1988).

[11] Commonwealth v. Kennedy, 604 A.2d 1036 (Pa. Super. 1992)(citing Washington v. Texas, 388 U.S. 14, 23 n. 21, 87 S.Ct. 1920, 1925 n. 21 (1967)). The statutory privilege has been interpreted as being absolute and has not been outweighed by a defendant's due process rights.

[12] United States v. Mazzola, 217 F.R.D. 84 (D.Mass.2003): "The Supreme Court in *Jaffee,* a civil proceeding, recognized a psychotherapist privilege under Rule 501 under federal common law applicable to confidential communications made to licensed psychiatrists, psychologists and social workers. Jaffee v. Redmond*,* 518 U.S. 1, 12-18, 116 S.Ct. 1923 (1996). **The privilege was not based on the Constitution or rooted in any constitutional right**. United States v. Glass*,* 133 F.3d 1356, 1358 (10th Cir.1998). **Nor was it subject to a balancing test.** *Jaffee,* 518 U.S. at 17-18; *Glass,* 133 F.3d at 1358. **The Court left the contours or reach of the privilege to be addressed in the future on a case-by-case basis**. *Jaffee,* 518 U.S. at 17.

[13] Bassine v. Hill, 450 F.Supp.2d 1182 (2006). This case involved Oregon's statute, which provides for the privilege but carves out a limited exception in cases of child abuse.

[14] *Mazzola*, 217 F.R.D. 84. *Mazzola* was a tax fraud case where a co-defendant was the government witness' father and the records were determined relevant to motivations for testifying, including financial: "[d]efendant in tax fraud prosecution whose brother was key government witness was entitled to pretrial disclosure to counsel of witness's medical records concerning perceived abuse by father, who was codefendant, as well as records referencing witness's financial difficulties and his fragility, mental instability and anxiety; abuse records would assist jury in evaluating witness's credibility and motivations for testifying, financial references could support defense that witness had embezzled underreported funds in question, and mental-state records were material to witness's perception of events and ability to recall them." (Although the societal interest in guarding the confidentiality of communications between a therapist and his or her client is significant, it does not outweigh the need for effective cross-examination of this key government witness at the criminal trial. *See generally Jaffee,* 518 U.S. at 9-10 (question of whether to recognize federal common law privilege under Rule 501 in light of reason and experience is whether privilege " 'promotes sufficiently important interests to outweigh the need for probative evidence'"). Reason and experience caution against recognizing a blanket federal common law

harassment and humiliation.[15] As Justice Cardozo stated in 1934: "[J]ustice, though due the accused, is due the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."[16]

A search of **military** case law revealed only three criminal cases where 513's constitutionally-required exception was at issue, and, in those cases, the courts did not analyze the rule or the exception.[17] However, many cases analyze this requirement under MRE 412, and it is that constitutionally-required exception that has led some defense attorneys to request and some judges to rule in favor of accessing records and/or admitting information at trial. The constitutionally-required language seems to make this privilege "different" from others, causing defense attorney to treat it as an invitation to attempt to breach it, and judges to second guess the sanctity of the privilege and thereby grant greater access to the records than the rule actually allows.

Defense Requests for Records, the Prosecutor's Response, and the Impact on the Criminal Justice Process
A scenario could play out as follows: The defense attorney requests that a victim's mental health records be subpoenaed on the basis that they contain potentially exculpatory evidence.[18] Generally, in order to pierce the privilege, the defense must establish that the information is critical to the defense and that the defendant cannot obtain the information any other way.[19] The defense is required to file a request in writing and then show that the information sought is relevant, material, and necessary.

Such requests, however, may be a defense strategy to introduce irrelevant information to embarrass, harass, or intimidate the victim.[20] Such requests may also be rooted in a desire to **delay access to justice**, as research and anecdotal evidence show that trial delays contribute to victims' inability to continue to engage with prosecutors and the criminal justice system. Notably, such requests are often facades for "fishing expeditions" when the defense has *no basis* upon which to believe that the information sought will actually be material to the defense.

Because the privilege is so significant, prosecutors should stress that the benefits to the patient and to society support upholding the privilege.[21] Patients must feel free to seek treatment for the deepest issues without the

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privilege for therapist records of an important government witness regarding therapy sessions temporally proximate to the criminal charges).

[15] *See* United States v. Brown, 479 F. Sup. 1247 (D. Md. 1979).

[16] Snyder v. Massachusetts, 291 U.S. 97 (1934).

[17] United States v. Hudgins, 2014 WL 2038866 (A.F.Ct.Crim.App. Apr. 3, 2014); United States v. Klemick, 65 M.J. 576 (N.M.C.C.A. 2006); United States v. Palmer, 2013 WL 6579713 (A.F.Ct.Crim.App. Nov. 25, 2013).

[18] A common defense argument for access to the records is that such access is constitutionally required. It is worth nothing here that defendants do not have a constitutional right to pretrial discovery of information, such as the mental health records of the victim. There is, however, a constitutional right to adequate assistance of counsel during the pretrial and plea process that may impact a defendant's decision to enter into a plea. Missouri v. Frye, 132 S.Ct. 1399 (2012); United States v. Ruiz, 536 U.S. 622 (2002). When entering into a plea agreement with a defendant where the victim's mental health record could have been an issue in the case, prosecutors should note, on the record, the plea is being entered into without the mental health history.

[19] *See, e.g.,* KY. R. EVID. 506 ("Counselor-Client Privilege," overcoming privilege only where judge finds substance of communication is relevant to an essential issue; there are no alternative means to obtain a substantial equivalent of the communication, and the need for the information outweighs the interest protected by the privilege).

[20] Prosecutors should ask themselves whether this is a defense fishing expedition or possibly a tactic designed to intimidate a victim into silence due to fear that a trusted counselor will be forced to reveal details of victim disclosures that are sensitive or embarrassing or that might place the victim at risk.

[21] In cases involving a raised or known mental health diagnosis, and where the defense has motioned to or actually subpoenaed mental health records, prosecutors may want to consult with mental health experts and obtain accurate information about a mental health diagnosis and treatment in order to successfully argue that the evidence sought by the defense neither establishes the context of the assault nor does it affect the victim's truthfulness or ability to perceive what the offender did to her; a victim's depression, for example, is irrelevant and, therefore, should be inadmissible. A prosecutor need not know about the victim's specific condition, *e.g.*, depression, to argue objectively about the condition, and expert consultation as well as a review of the literature could be helpful in getting a prosecutor up to speed. Additionally, experts can assist prosecutors in understanding the relevance and impact of medications

fear of public disclosure. Society necessitates the potential for peace and safety that psychotherapists can provide to individuals, families, and communities.

The privilege should not be pierced where:

- There is a constitutional right to privacy, and that right cannot be removed by legislatures or courts;
- The privilege has been established by state rule and principles of common law;
- The information is irrelevant;
- The evidence has no probative value;
- The evidence has no bearing on the victim's credibility or on any other material issue;
- The evidence is unduly inflammatory (and will only distract from the facts of the case);
- The danger of harm or prejudice to the victim or other witnesses outweighs the evidence's probative value;
- The exclusion of the evidence does not violate the defendant's due process right to a fair trial; and
- The evidence is inadmissible under state or federal constitution or statute.

Most often, the requests themselves – at best – cause trial delays. At worst, they cause the victim to be re-traumatized, and/or distrust or be concerned about the trusting relationship with the very professionals whom s/he is supposed to be able to rely on for care and services.

These requests place burdens on more than the court system and the victim. Service providers and their agencies are burdened with: responding to subpoenas, missed office and counseling time, concern over serving other patients, and some even have to hire attorneys to help them defend against subpoenas – a cost that most have not factored into their already cash-strapped budgets and one that they simply cannot afford.

How Defense Attempts to Subpoena Records and Judge's Handling of Such Requests Impact the Victim and the Case

Because of the uniquely personal nature of the attacks and victim blaming that sexual assault victims face, they require support unique to their victimization. A defense request to subpoena records – in and of itself – may cause the victim to suffer additional trauma through grave concern that her deep thoughts and feelings that she shared with a therapist will be revealed to the defendant and the public.

When requests for exceptions to the psychotherapist-patient privilege are granted, the effects are devastating. Piercing the sanctity of the very professional relationship that has helped the patient heal may invade her/his privacy to such an extent that it has a chilling effect – preventing the victim and others from seeking the therapeutic services of these professionals, or from disclosing violence out of fear that their mental health records will be accessible to others, or from feeling unable to participate in the prosecution of the offender. The end result would be to shut the door on justice for the victim, accountability of the offender, and safety for the community.

Conclusion

Victim privacy laws are the pillars upon which the safe disclosure of abuse and the receipt of services have been built. If sexual assault victims do not feel that their private information will remain so under confidentiality and privilege laws, victims may be hesitant to reveal their trauma and get the services that they need to begin their physical and psychological healing processes. They will be less likely to engage law enforcement, and less likely to participate in the prosecution of the offender. Rules should be and are – across the board – designed to support survivors, to encourage persons to seek help from professionals, and to keep these records confidential.

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that the victim may be taking and whether they could interfere with a person's mental, physical, or cognitive processes and thus protect the psychiatrist/client privilege.

Prosecutors must be proactive in filing motions to keep out defense attempts to access records. They should fight defense attempts to subpoena records and introduce "evidence" by filing responses in writing and aggressively countering arguments with research and case law. Further, judicial education on the realities of sexual assault and intimate partner violence, myths commonly associated with these cases and with survivors, and how those myths can impact analysis of evidence and trial court rulings, are key to proper analysis of the law and its application. Judges who are appropriately trained can help ensure that victims who participate in the criminal justice process have access to justice to the greatest extent possible under the law.

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