

## Issue Update

### PRESIDENT'S NOTES

By the time this MDLA monthly Newsletter is received, our May 13, 2005 Annual Meeting will have resulted in the election of a new Board of Directors and quite possibly, the new Board will have held its first meeting and elected new officers, thereby ending my one-year term as the MDLA President. This is my farewell message to the MDLA's Officers and Directors with whom over the past year I have had the pleasure and privilege to work. It is also my farewell message to all of the MDLA members, new and old, whom I have had the privilege to serve. It has truly been my pleasure to serve all of you and I will always feel honored to have been given the opportunity to serve as the MDLA President.

The MDLA has accomplished much during the past year thanks to its members, its Directors, and its Executive Director, Julie Petersen. I was the first President of this great organization to work with Julie and she has made my efforts almost effortless. We were blessed to have found Julie and to have convinced her to join our organization as its Executive Director. I was also the last President to have the pleasure of working with our former Executive Director, Jim Doyle. Without Jim's support, understanding and commitment to the MDLA, we could not have accomplished all we have this past year. Jim still provides his experience and assistance to the MDLA and I thank him for those continuing efforts.

The MDLA web site (<http://www.MassDLA.org>) has been improved and updated on a regular basis. This past year we have added as a service to our members, to our members' clients, to our members' prospective clients and to others, a searchable listing of members. The MDLA expects the searchable attorney data base of its members will be rewarding to all that are listed and to all that use it to locate defense attorneys in Massachusetts.

The MDLA membership has seen substantial growth with a corresponding growth in the interest our members give to our organization. We expect the trends will continue.

The MDLA's cooperation with other Bar Organizations has improved with our closer ties on an on-going basis to DRI (the Defense Research Institute) and both organizations have reaped new benefits by the closer association. We have maintained or improved relationships with the Massachusetts Bar Association, the Joint Bar Committee for Judicial Appointments, the Massachusetts Academy of Trial Attorneys and other Bar organizations.

I am perhaps most proud of the MDLA's adoption of our Diversity Statement. The MDLA is truly an organization that values the perspectives and varied experiences that are found only in a diverse membership. The promotion and retention of a diverse membership is essential to the success of the MDLA as a whole, as well as to our members' respective professional pursuits. Diversity brings to the MDLA a broader and richer environment resulting in creative thinking and solutions. The MDLA is committed to promoting and maintaining a culture that supports and promotes diversity in its organization, leadership and membership.

The MDLA also established our Associates' Division to improve commu-

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#### Upcoming Events

MDLA MATA Golf  
Tournament  
June 13, 2005

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nications and services to members admitted to practice for five or fewer years. Meetings and programs arranged by the Associates' Division members have been well attended and well received. In addition to presentations made by experienced trial attorneys to enhance the skill of associates, the meetings and relationships formed among the Associates have provided a forum otherwise unavailable to its members.

This past year the MDLA formed important committees focusing on Communications, Membership, Functions, Associates, Bar Organizations and Service to the Bar and Public. The Committee Chairs and members have contributed greatly to our successful past year.

Last Fall, our traditional "Rookie Seminar" was well received and well attended. For the first time it was solely sponsored by the MDLA and held at Suffolk University Law School. Without naming names, I especially appreciated the efforts of those who organized the

Seminar, those who made presentations and, especially, to those who attended and made all of the hard work and effort worthwhile.

The MDLA's Winter social (and CLE program) with the theme, "Meet the MDLA's Past Presidents," was a truly wonderful time to meet with the MDLA members and our Past Presidents. It was well attended by both MDLA members and MDLA Past Presidents. Hopefully, next year's winter social will be even better because of the memory of this year's event. My suggested theme for next year's social is, "Meet the MDLA Defense Lawyer of the Year" recipients.

The MDLA had other accomplishments during this past year not focused on in these, my last President's Notes. By omitting the other accomplishments I do not intend to lessen their importance. I simply recognize we have limited space in the MDLA Newsletter.

This issue's featured article by Myles W. McDonough offers a review of the discoverability of a plaintiff's psychother-

apy records. It's a timely topic and Myles article provides good advice. In fact, the application of the principles of fundamental fairness, Myles identifies, is applicable to many other types of discovery issues as well.

If it is not already sold out, it is not too late to mark the June 13, 2005 MDLA/MATA golf tournament at the Hopkinton Country Club on your calendar. It offers a private 18 hole, par 72, championship golf course designed by British Architect Ian Scott-Taylor. Please consider being a sponsor and visit the MDLA web site to obtain information for registration and sponsorship.

My final note is to let all the MDLA members know that "farewell" is not goodbye. I intend to continue to serve on the MDLA Board of Directors and to actively participate in our Association whenever I am called upon or whenever I can be of assistance.

Your MDLA President,  
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## MDLA ASSOCIATES DIVISION

The Associates Division met on Thursday, May 26, 2005 at Sloane & Walsh in Boston. John Crawford and Brad Taylor from UHY Advisors, a forensic accounting firm, gave a presentation on evaluating damages. The meeting was well-attended by associates from many MDLA member firms. Thanks to Sloane and Walsh and Mike Kerrigan for hosting the event.

The next lunch meeting will be on Thursday, July 21, 2005 at Donovan Hatem, World Trade Center East, Two Seaport Lane, Boston, MA. The featured topic will involve trial preparation. We will email all members with further details.

For more information about the MDLA Associates Division, please contact David Lemasa, Chair, at (508) 230-2500 or by email at dlemasa@LynchLynch.com

## DISCOVERABILITY OF PLAINTIFF'S PSYCHOTHERAPY RECORDS

*Myles W. McDonough, Esq., Sloane and Walsh, LLP*

### I. INTRODUCTION

Massachusetts General Laws c. 233, § 20B, affords a privilege to a litigant's psychotherapy records, subject to certain exceptions which include the following:

the privilege granted hereunder shall not apply to any of the following communications: . . . (c) in any proceeding . . . in which the patient introduces his mental or his emotional condition as an element of his claim or his defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communications be disclosed than that the relationship between the patient and psychotherapist be protected.

The discoverability of plaintiff's psychotherapy records, and more specifically the application of the limited privilege concerning such records under § 20B, is a subject which has been handled under a variety of different approaches by the state and federal trial courts in Massachusetts. See Lauriat, McChesney and Gordon, *Discovery*, 49 Mass. Practice Series, § 5.22 ("[T]here is a split in authority as to whether the privilege is waived once a plaintiff claims emotional distress damages."). While some courts have permitted examination of such records when claims of emotional distress are asserted, *see, e.g., Dr. Marjorie McMillan v. Massachusetts Society for the Prevention of Cruelty to Animals; Dr. Gus Thornton; and Dr. Paul Gambardella*, Order on Plaintiff's Objections and Motion for Reconsideration of Magistrate's Order of November 2, 1995, and Magistrate's Order of April 28, 1993, others have drawn upon the "garden variety" test announced in *Sabree v. United Brotherhood of Carpenters & Joiners of America Local No. 33*, 126 F.R.D. 422 (D. Mass. 1989), wherein the court denied access to such records

on the theory that the plaintiff did not place her mental or emotional condition "at issue" where she had asserted a "garden-variety" claim of emotional distress as opposed to a claim of formally diagnosed "psychic injury or psychiatric disorder". *Id.* More recently, some Superior Court decisions have ruled that even where a plaintiff places his or her mental or emotional condition at issue as an element of a claim or defense, the § 20B(c) exception will not apply unless:

- (1) The patient calls the psychotherapist as a witness or introduces evidence of the communication through her own testimony or otherwise, or
- (2) the party seeking access to the communication makes a specific showing that the truth-seeking function of the trial will be seriously impaired unless a disclosure of the communication is ordered.

*Linscott v. Burns, et al.*, 18 Mass. L. Rptr. 685, 686 (January 27, 2005) (Agnes, J.). Application of this test has yielded the result in some cases that plaintiffs can avoid disclosure of psychotherapy records even where their emotional and mental conditions are "at issue" where the plaintiff does not seek to introduce the records or to call a mental health professional as a witness. *See, e.g., Robart v. Alamo Rent A Car, LLC*, 19 Mass. L. Rptr. 154, 156 (April 25, 2005) (Gazanio, J.).

This article will outline some principles in Massachusetts law, as well as developments in the mental health area, which defense counsel might consider in seeking relief from the trial courts by way of disclosure of such records as a matter of fundamental fairness in defending tort actions involving emotional distress claims, whether of the so-called "garden variety", or involving formally diagnosed mental conditions. Some strate-

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gic approaches are proposed which are designed to emphasize to the motion judge that the interests in confidentiality and avoidance of embarrassment to mental health patients can be accommodated while affording defendants access to information which, one might argue, must be disclosed in the civil litigation context not only as a matter of fundamental fairness, but as a matter of preservation of the "sacred" right to jury trial under Article XV, Part One of the Massachusetts Constitution.

II. THE MASSACHUSETTS "SACRED"  
RIGHT TO JURY TRIAL IN THE  
CIVIL/TORT CONTEXT.

Part One, Article XV of the Massachusetts Constitution provides:

[I]n all suits between two or more persons, except in cases in which it has heretofore been otherwise used and practiced, the parties have a right to trial by jury; and this method of procedure shall be held sacred . . .

As observed by the Supreme Judicial Court:

A trial by jury comprehends a full and fair hearing on all relevant issues where all questions of fact presented by the evidence are decided by the jury in accordance with the principles of law given to them in the instructions by the Judge. *New England Novelty Co., Inc. v. Sandberg*, 315 Mass. 739, 750 (1944).

The Court has recognized that common law actions:

. . . belong [ ] to the class of cases . . . where under the Constitution trial by jury must be held sacred and jealously guarded against every encroachment. The power in the Superior Courts is ample to make rules regulating practice and procedure, expediting the trial of causes and the general conduct of its business, and such rules are to be respected and enforced . . . (citations omitted) . . .

But of course such rules can not override the Constitution. The essence of that right is that controverted facts shall be decided by the jury. *Each party must have on proper demand at least one fair opportunity to present to the jury the evidence which raises a disputed issue of fact.* *Farnam, et al. v. Lennox Motor Car Co.*, 229 Mass. 478, 481 (1918) (discussing Mass. Constitution, Part One, Article XV).

The courts must interpret G.L. c. 233, § 20B, like all statutes, in a manner consistent with these constitutional rights. *Bowe v. Secretary of the Commonwealth*, 320 Mass. 230, 243-244 (1946) ("a provision contained in a statute cannot have any force as law if it conflicts with any provisions contained in the higher law of the Constitution"); *Commonwealth v. Stockhammer*, 409 Mass. 867, 883 (1991) ("observing in the criminal context as to § 20B that "even absolute statutory privileges (non constitutionally based) must yield to a defendant's constitutional right to use privileged communications in his defense"); *Commonwealth v. Bellino*, 320 Mass. 635, 639 (1947) ("Whatever tends in any appreciable degree to impair the essentials of the right [to jury trial under Article XV] must be struck down.").

Accordingly, when a plaintiff seeks recovery for emotional distress, whether claimed to be of the "garden variety" or to have resulted from the infliction of a formally diagnosed psychiatric or "psychic" mental condition, such questions as (1) the cause of such distress, (2) the length and severity of it, (3) steps taken to mitigate it, and (4) the effect it might have upon, for example, consortium with the injured plaintiff's spouse or child, would appear to be the sort of "controverted facts" in cases involving such claims which, under Article XV as interpreted by *Farnam*, "shall be decided by the jury", and as to which the defendant must have "at least one fair opportunity to present to the jury the evidence which raises a disputed issue of fact. *Id.* at 481.

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*Discoverability Continued*

Accordingly, a trial court's depriving a defendant of records which would seem to bear on such issues on the basis of a judicial *ipse dixit* that the emotional distress is of a "garden variety" would seem to be the sort of "encroachment" on the sacred right to jury trial contemplated under Article XV.

This concern is underscored by developments in Massachusetts case law acknowledging the complexity and inextricably intertwined nature of physical and emotional injury:

Physicians themselves often cannot distinguish between the mental and the physical aspects of an emotional disturbance. Modern science shows that all emotional disorders have physical ramifications, while all physical illnesses have emotional aspects. *See Comment, Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 *Geo. L. J.* 1237, 1241 & n. 24 (1971) and authorities cited. Judges, then, cannot sit as "super doctors" and cannot classify ailments along physical versus mental lines while the progress in medical sciences inextricably links these two realms of human physiology. On a record such as in this case, such matters are better left to a jury, to be decided on expert medical testimony.

*Sullivan v. Boston Gas Company*, 414 Mass. 129, 134-135 (1993). This intertwined complexity between physical and mental injury is also reflected in the current mental health literature. For example, the Diagnostic and Statistical Manual of Mental Disorders, 4th ed. - Text Revision ("DSM - IV - TR") (American Psychiatric Association 2000) observes with regard to the "Definition of Mental Disorder":

Although this volume is titled *The Diagnostic and Statistical Manual of*

*Mental Disorders*, the term *mental disorder* unfortunately implies a distinction between "mental" disorders and "physical" disorders that is a reductionistic anachronism of mind/body dualism. The compelling literature documents that there is much "physical" in "mental" disorders and much "mental" in "physical" disorders. The problem raised by the term "mental" disorders has been much clearer than its solution, and, unfortunately, the term persists in the title of DSM IV because we have not found an appropriate substitute. DSM IV - TR, Introduction at xxxi.

Further, "[i]n DSM IV, there is no assumption that each category of mental disorder is a completely discreet entity with absolute boundaries dividing it from other mental disorders or from no mental disorder." *Id.* at xxxi.

Given that both the appellate case law and the mental health literature dispel the notion that even experts can easily discern between formally diagnosable mental conditions and where no such condition exists, it would seem that a trial court's simply labeling a given situation to present nothing beyond a "garden variety" emotional distress situation is a dubious basis upon which to deprive a defendant information and materials which would seem to be called for under the Massachusetts Constitution.

While Article XV, with its explicit reference to the "sacred" right to jury trial and right to resolution of all factual issues by a jury, provides for fundamental fairness in the civil trial context, it has also been suggested that the constitutional right to introduce pertinent, favorable evidence in the civil context emanates from the due process clause. *See* Edward J. Imwinkelreid, *"The Case for*  
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*Recognizing a New Constitution Entitlement: The Right to Present Favorable Evidence in Civil Cases*," 1990 Utah L. Rev. 1 (1990) (suggesting the existence of this right in civil cases under the due process clause); see generally Nowak & Rotunda, *Constitutional Law*, § 13.7 (5th ed. 1995); Nowak, et al., *Treatise on Constitutional Law: Substance and Procedure*, § 17.9, at 42 (Supp. 1989) ("[T]he Supreme Court's focus . . . often centers on questions of fairness and reliability of the fact finding process, concerns which are at the heart of due process analysis."); *Cardoso v. Reno*, 127 F. Supp. 2d 106, 116 (D. Conn. 2001) ("Procedural due process protections are designed to help ensure accuracy in the truth finding process . . .").

### III. EMOTIONAL DISTRESS "AT ISSUE"

In its recent holding that a finding of discrimination or retaliation, by itself, is no longer sufficient to permit an inference of, or presumption of, emotional distress in a claim for employment discrimination under G.L. c. 151B, the Supreme Judicial Court outlined the criteria for proof of such damages. The Court stated:

Emotional distress damage awards, when made, should be fair and reasonable, and proportionate to the distress suffered. Each award should be case specific and should not be determined by formula or by precise reference points. While evidence in the form of some physical manifestation of the emotional distress, or evidence in the form of expert testimony, is not necessary to obtain an award, such evidence certainly would be beneficial. An award must rest on substantial evidence and its factual basis must be clear on the record. Some factors that should be considered include: (1) the nature and character of the alleged harm; (2) the severity of the harm, (3) the length of time the complainant has suffered and reasonably expects to suffer, and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by

taking medication). See *Restatement (Second) of Torts* § 905 comment i and § 912 (1979). In addition, complainants must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress. See *id.* at § 917. Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable. *Stonehill College v. Massachusetts Commission Against Discrimination*, 44 Mass. 549, 576 (2004). Since the damage awards discussed in this passage, those for emotional distress arising out of employment discrimination, need not be based on formally diagnosed psychiatric conditions, they would appear to potentially include the sort of "garden variety" damages referred to in *Sabree*, which as noted was itself an employment discrimination case. Given the Court's admonishment that "factors that should be considered include" attempts at mitigation through counseling or medication, and the question of whether the emotional distress is caused by the defendant's conduct or pre-existing mental conditions or other circumstances, it would seem inescapable that a plaintiff's psychotherapeutic records must be examined in order to determine whether they contain information which a jury should examine to answer these critical questions.

A number of Superior Court justices have acknowledged this. For example, in *Martin v. Walgreen Eastern Co., et al.*, Worcester Superior Court Civil Action No. 03-134A (Memorandum and Order of March 21, 2005) (Agnes, J.), the Court was presented with a malpractice action alleging an incorrect prescription for an underlying "mental or emotional" condition, and where the plaintiff sought recovery for "pain of body and mind". The Court acknowledged that the plaintiff had not indicated whether or not she planned to call a psychiatrist or psychotherapist as a witness in the case, but observed:

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The truth seeking function of the trial will, however, be impaired if the records are not disclosed. . . . The prescription that [plaintiff] alleges that the defendants' wrongly dispensed was one to treat [her] diagnosed bipolar disorder . . . [and that she] did not receive the proper prescription medication aimed at treating her "mental or emotional" condition for a period of time. Since the alleged negligence directly impacts and relates to the treatment of a patient suffering from a diagnosed "mental or emotional" illness, *it will be impossible*, without the requested records, to determine the truth as to the extent that [plaintiff's] alleged damage is a result of the defendants' negligence, and that attributable to the "mental or emotional" stress from which [plaintiff] already suffered. *Martin*, Slip Opinion at 3-4 (emphasis supplied).

In a recent article discussing the issue of production of psychiatric records in employment discrimination litigation, another Superior Court Judge remarked:

In *Stonehill College*, at 576, the SJC held that "emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable." Defense attorneys should have access to psychiatric records in order to prove that the emotional distress was caused by other circumstances or by a pre-existing condition. I can't think of any circumstances where I would deny defense counsel access to psychiatric records.

"Lawyers Weekly Evidence Workshop: Judges Answers Questions on Employment Law", 33 M.L.W. 1950, 1951 (May 2, 2005). Other commentators discussing the impact of *Stonehill College* on discoverability of psychiatric records have concluded likewise. Adams, S. and Miller, B., "'Stonehill College': Proof of Emotional Distress Did Not Stay the Same", 33 M.L.W. 367, 33 Massachusetts Lawyers Weekly No. 7, p. 11 (October 11, 2004).

IV. INTERESTS OF JUSTICE

Assuming that under the above principles a plaintiff is deemed to have put his mental condition "at issue", then § 20B requires that the trial court determine whether disclosure is mandated notwithstanding the qualified privilege "in the interests of justice".

As observed by the Court in *McMillan*, *supra*, it is axiomatic that Civil Procedure Rule 26 "is designed to encourage 'mutual knowledge of all relevant facts.'" *McMillan*, Slip Opinion at 16-17, quoting Notes of Advisory Committee on Rule 26 [Federal Rules of Civil Procedure], 1983 amendment (quoting *Hickman v. Taylor*, 329 U.S. 495, 507 (1947)) (emphasis supplied), and that "[d]iscovery is as appropriate for proof of a plaintiff's damages as it is for proof for other facts essential to [her] case.". *Id.* at 17 (citations omitted). Thus, where one party has access to the best information on an issue put in contest by that party, and seeks to hide behind a privilege to keep it from the other, such conduct defeats not only the mutuality of knowledge deemed essential under the rules of discovery, but is also "*contrary to the most basic sense of fairness and justice*". *Sarko v. Penn-Del Directory Company*, 170 F.R.D. 127, 130 (E.D. Pa. 1997) (emphasis supplied).

The *Sarko* Court's sentiment that disclosure is compelled where the records relate to issues necessarily entailed within the plaintiff's case implicates "the most basic sense of fairness and justice" finds support throughout the law of privilege in various contexts. See, e.g., *Greater Newburyport Clam Shell Alliance v. PSCHN*, 838 F.2d 13, 20 (1st Cir. 1988), citing *Wigmore on Evidence*, § 2327 at 635-636 (McNaughton rev. ed. 1961) ("Particularly in a civil case, a privileged party cannot fairly be permitted to disclose as much as he pleases and then to withhold the remainder to the detriment of the defendant."). *Clam Shell Alliance* observed that:

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In a civil damages action, . . . fairness requires that the privilege holder surrender the privilege to the extent that it will weaken, in a meaningful way, the defendant's ability to defend. That is, the privilege ends at the point where the defendant can show that the plaintiff's civil claim, and the probable defenses thereto, are enmeshed in important evidence that would be unavailable to the defendant if the privilege prevails. The burden on the defendant is proportional to the importance of the privilege. The Court should develop the parameters of its discovery order by carefully weighing the interests involved, balancing the importance of the privilege asserted against the defending party's need for the information to construct its most effective case. *Id.* at 20

The Supreme Judicial Court adopted the principles described in *Clam Shell Alliance* with respect to the attorney-client privilege in *Darius, et al. v. City of Boston*, 433 Mass. 784 (2001). The *Darius* court "accept[ed] the premise underlying the concept of 'at issue' waiver of the attorney-client privilege: there are circumstances in which a litigant may implicitly waive the privilege, at least in part by injecting certain types of claims or defenses into a case." *Darius*, 433 Mass. at 284. Finding such waiver is appropriate where it is shown that the privileged information sought to be discovered is "not available from any other source." *Id.* at 284. The appropriateness of applying the "at issue" waiver principle developed for the attorney-client privileges has been noted by courts dealing with "at issue" waiver where psychotherapeutic records are involved, in light of the similarities of the privilege insofar as they are designed to foster open and trusting relationships. *Sarko*, 170 F.R.D. at 130; but see Sabree, *supra*; see generally *Jaffee v. Redmond*, 518 U.S. 1, 10, 18 (1996) (analogizing between attorney-client privilege and psychotherapy privilege as a matter of Federal common law but not reaching question of "at issue" waiver).

As Judge Learned Hand stated with regard to the Fifth Amendment privilege, "the privilege is to suppress the truth, but that does not mean that it is a privilege to garble it: . . . it should not furnish one side with what may be false evidence and to deprive the other of any means of detecting the imposition." *The United States v. St. Pierre*, 132 F. 2d 837, 840 (2d Cir. 1942), *cert. dismissed as moot* 319 U.S. 41 (1943). This is consistent with the fundamental precept under Massachusetts law that a "person may not seek to obtain a benefit or to turn the legal process to his advantage while claiming the privilege as a way of escaping from obligations and conditions that are normal incidents to the claim he makes." *Colley v. Benson, Young & Downs Insurance Agency, Inc.*, 42 Mass. App. Ct. 527, 533 (1997). Decisions dealing with psychotherapeutic records have likewise acknowledged that fundamental fairness and the "interests of justice" demand disclosure where the records are relevant in key contested issues and a defendant cannot hope to create their equivalent through its own retention of experts. See *McMillan, supra*. See also 1 Jeremy Bentham, *Rationale of Judicial Evidence* pt. III, ch. 1 (1827) (expressing general opposition to exclusionary rules which preclude probative evidence, "[e]vidence is the basis of justice; exclude evidence, you exclude justice.").

### V. THE GARDEN VARIETY TEST RATIONALE - THE "CHILL FACTOR"

In addition to subsequent developments under Massachusetts law concerning the interplay of physical injury with psychological injury, and developments in the mental health field emphasizing the difficulties even among professionals in distinguishing between formally diagnosed conditions and a more general concept of "emotional distress", continued application of the "garden variety" "test" is further suspect because one of the major assumptions underlying application of the concept has more recently been called into question. Historically, the

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rationale for the rule was the assumption that there was a net societal benefit that relatively greater amounts of people in need of mental health care would seek it if they were assured that their records would remain confidential, notwithstanding the harm to fair adjudication of disputes which would result from imposition of a privilege. See, e.g., Sabree 126 F.R.D. at 425. Courts took solace with respect to the loss of relevant evidence under the rationale that in the absence of a privilege "much of the desirable' psychotherapist-patient communication that could qualify as [for example] 'admissions . . . by a party . . . is unlikely to come into being'". Imwinkelreid, E., "Questioning the Behavioral Assumption Underlying Wigmorean Absolutism in the Law of Evidentiary Privileges", 65 U. Pitt. L. Rev. 145, 155, quoting *Jaffee v. Redmond*, 518 U.S. 1, 11-12 (1996) (establishing a federal common law psychotherapy records privilege). "The assumption is that the lay person would refrain from consulting unless, at the time of the communication, the lay person can confidently predict that a Court will later apply the privilege to suppress testimony about the communication." *Imwinkelreid, supra* at 156.

Various empirical studies, however, have suggested that "people do not look to [evidence] law for guidance in their decision to enter into therapy or make disclosures in therapy," *Imwinkelreid, supra* at 160, quoting Shuman, D., et al., "The Privilege Study (Part III): Psychotherapist - Patient Communications in Canada, 9 Int'l J.L. & Psychiatry 393, 416 (1986); Shuman, D., et al., "The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege," 60 M.C.L. Rev. 893 (1982), and that "[t]he evidence for the proposition that a psychotherapist - patient privilege is necessary for effective psychotherapy is highly questionable. *Id.*, citing *Shuman, The Privilege Study, supra* at 418. One commentator has observed that 'none of these studies lends any solid support to Wigmore's generalization that without the assurance of confidentiality furnished by an evidentiary privilege,

the average or typical layperson would not consult or confide . . . . The world does not appear to revolve around the courtroom to the extent that Wigmore assumed." *Imwinkelreid, supra* at 163.

### VI. IN CAMERA REVIEW

In the criminal context, the Supreme Judicial Court has recognized that fundamental fairness requires that a defendant be afforded an opportunity to make a showing as to potential relevance of a witness's psychiatric records, and upon such an initial showing that the defendant be afforded at least in camera review with creation of an adequate record for appellate review purposes as to documents not provided to counsel. *Commonwealth v. Bishop*, 416 Mass. 169, 181-183 (1993). A number of Superior Court judges have ruled that the "*Bishop*" protocol is also proper in civil cases where privilege is asserted as to psychotherapeutic and social worker records. See, e.g., *Kippenhan v. Chalk Services, Inc.*, 2 Mass. L. Rep. 121, 122 n.1 1994 Mass. Super. LEXIS 644 (April 27, 1994); *Perrin v. S & A Enterprises, Inc.*, 9 Mass. L. Rep. 619, 620 n. 1 1999 Mass. Super. LEXIS 68 (February 16, 1999); *Boremi, et al. v. Lechmere, Inc.*, 1993 Mass. Super. LEXIS 76 (November 22, 1993); *McCue v. Kraines, et al.*, 1 Mass. L. Rep. 298, 299, 300 n. 1 1993 Mass. Super. LEXIS 288 (November 22, 1993). Other judges, however, have declined to apply the protocol in civil cases on the theory that "[a] defendant's need for production of relevant records pertaining to a plaintiff's psychological condition is, if anything, greater [ ] in a criminal case where the defendant's freedom and reputation may be at stake, than in a civil case, where money damages alone may be involved." *Robart v. Alamo Rent A Car, LLC*, 19 Mass. L. Rptr. 154, 156 (March 16, 2005). Such cases have relied upon *Herridge v. Bd. of Registration in Med.*, 420 Mass. 154, 157 (1995), wherein the court observed that the *Bishop* protocol "rests on Federal and State constitutional guaranties of due process that have applications in criminal proceedings."

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*Herridge*, however did not involve a common law action subject to the sacred jury trial right discussed in *Farnam, supra*. Rather, it was an administrative proceeding concerning the licensure of a physician by the state, and accordingly would seem distinguishable from disputes concerning psychotherapeutic records in civil tort actions. Moreover, while one might reasonably argue that infringement of one's personal liberty entails greater harm than exposure to money damages, that does not answer the question of whether, in the civil money damages context, disclosure of psychiatric records, or at least *in camera* review of them, is nonetheless required as a matter of fundamental fairness and/or constitutional right, whether under the due process clause or Massachusetts' Article XV.

## VII. PRACTICE POINTERS

In light of the above discussion, defense counsel may wish to undertake a strategy in pursuit of psychiatric records which will emphasize to the Court that *both* of the conflicting values at play in § 20B - - protection of confidentiality so as to encourage persons in need to seek mental health care, and the potentially overriding "interests of justice" which may compel production - - can be reasonably satisfied. Along this line, counsel should consider:

1. Whether the *Sabree* decision is even applicable - - emphasize that if the plaintiff is claiming the occurrence or aggravation of a clinically diagnosed mental disorder, or that such a diagnosed disorder is somehow related to his measure of damages (e.g. effect on consortium claims), then the case should not be considered a "garden variety" emotional distress claim;
2. If there is no formally diagnosed psychiatric condition "at issue" in the case, consider a challenge to the continued vitality of the "garden variety" test in light of the SJC's discussion in *Sullivan, supra*, and the developments in DSM IV - TR, *supra*;
3. Consider a challenge to the constitutional-

ity of an application of § 20B in a manner which would deprive the defense of an opportunity to put before the jury records and information which could be of obvious relevance to material issues of fact;

4. Demonstrate to the Court a willingness to obtain and examine the information in a manner which will be minimally intrusive upon, and maximally protective of, the plaintiff's interest in confidentiality. Consider, for example, a confidentiality order wherein such records would be reviewed only by counsel and any retained experts and other persons associated with the defense of the case, subject to further use in the litigation upon order of the Court; and

5. While, as noted, availability of the documents to defense counsel, who is far better positioned than the court to identify potential relevance of the documents, is essential, *see Stockhammer*, 409 Mass. at 882 ("determination of what may be useful to the defense can only be made by an advocate"); *Comm. v. Clancy*, 402 Mass. 664, 670 (1988) ("The judge is not necessarily in the best position to know what is necessary to the defense"), as a fallback consider asking (while maintaining an objection if direct disclosure to counsel is not ordered) for *in camera* review by the court with appropriate safeguards to maintain sealed copies of any documents withheld from the defense for purposes of later appellate review if necessary under the *Bishop* protocol.

## CONCLUSION

Given the current split in authority with regard to the resolution of issues surrounding psychotherapy records, the pursuit of such records of plaintiffs in civil actions can be a somewhat frustrating exercise. The application of principles of fundamental fairness underlying the sacred right to jury trial and the law of privilege, combined with a carefully tailored proposal to the Court which is respectful of any plaintiff's interest in reasonable protection of his confidentiality in such records, however, may prove of great assistance to defense counsel in working through these sensitive issues.

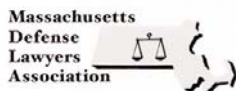
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