medical expert testimony in the determination of guardianship (Krasik MK: The lights of science and experience: historical perspectives on legal attitudes toward the role of medical expertise in guardianship of the elderly. *Am J Legal Hist* 33:201–40, 1989).

With the population of the United States aging, it becomes increasingly important for forensic psychiatrists to focus their attention on guardianship concerns. This case underscores the importance of the expert witness's need to "strive for objectivity" (Am Acad Psychiatry Law: *Ethics Guidelines for the Practice of Forensic Psychiatry.* Available at http://www.aapl.org/ethics.htm. Accessed January 15, 2010).

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Disclosure of Mental Health Records

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Courts Have a Gate-Keeping Role in Determining How Much of a Victim's Mental Health Records to Release to Defendants

In *State of Connecticut v. Kemah*, 957 A.2d 852 (Conn. 2008), the Connecticut Supreme Court reversed the trial court's decision to grant disclosure of the complainant's mental health records to the defendant. The defendant was charged with sexual assault and argued that, under Connecticut General Statutes, there was no initial gate-keeping role for the court because the complainant had waived confidentiality of her records to the prosecution and the police. The prosecution appealed and was granted an interlocutory order to the Connecticut Supreme Court on the basis that this legal issue is a matter of substantial public interest.

Facts of the Case

On December 8, 2004, the Connecticut State Police received a report of suspected sexual abuse at The Learning Clinic, a private residential school for children with emotional and behavioral problems. A 16-year-old female student claimed that she had been sexually involved with a male staff member, Ballah Kemah. As part of the police investigation, the complainant told an officer that she was at The Learning Clinic because of past drug use and that she was bipolar and had manic episodes. The State charged Mr. Kemah with one count of sexual assault in the second degree and one count of sexual assault in the fourth degree.

Mr. Kemah filed a motion for disclosure of the complainant's confidential mental health and school records. He asserted that the police and the state's attorney had been given access to the complainant's records and that it was his good-faith belief that the complainant had consented to such access. Mr. Kemah reported that the state had provided him with some confidential records, but had refused to disclose all such records, because an *in camera* review by the trial court was necessary in this case, pursuant to *State v. Esposito*, 471 A.2d 949 (Conn. 1984). Mr. Kemah contended that, under a line of appellate court cases, the *Esposito* "gate-keeping function" did not apply in the present case because the complainant had waived her right to confidentiality.

Mr. Kemah submitted as evidence of the complainant's consent three written releases: a release authorizing Day Kimball Hospital to disclose "any and all records pertaining to [the complainant's] treatment" to the police for purposes of "criminal investigation"; a release authorizing The Learning Clinic to disclose the complainant's "psychiatric/therapy records" to the police for purposes of "criminal investigation"; and a release authorizing The Learning Clinic to release "all information that you may have concerning [the complainant]. . .and [her] medical records, and psychological records including those of a confidential or privileged nature" to the office of the state's attorney. Mr. Kemah argued that disclosure of these records to him was necessary to protect his right to prepare a defense.

The trial court granted his motion for disclosure with the following proposition:

> Where the state's complaining witness has waived her right to confidentiality in "any and all information" concerning the witness and her medical and psychological records, including those of a confidential or privileged nature, and the records have been directly turned over to the prosecutor's office, there is no initial gate-keeping role for the court and the records should be disclosed to the defendant.

The trial court concluded that the three releases in the present case met this standard.

The state filed a motion for reconsideration, on which the trial court did not act, and a public interest appeal to the Connecticut Supreme Court followed. The state claimed that the trial court improperly failed to follow the procedures set forth in *Esposito* and its progeny before ordering the disclosure of the complainant's confidential mental health records to Mr. Kemah. The state contended that the trial court's conclusion that the releases in favor of the state resulted in an implied complete waiver of privilege contravened the specific, written waiver required by statute. The state further contended that the appellate court case law relied on by the trial court (holding that disclosure to the state requires disclosure to the defendant) is contrary to the Connecticut Supreme Court case law, as well as public policy, and should be overruled.

In response, Mr. Kemah argued that the court properly concluded that the releases waived confidentiality because they were general in nature and lacked any limitation on the use of the records. He also claimed that because the records at issue were necessary to prepare his defense, the *Esposito* procedures were not sufficient to protect his rights under *Brady v. Maryland*, 373 U.S. 83 (1963).

Ruling and Reasoning

The specific issue before the Supreme Court of Connecticut was whether the trial court had no gatekeeping function before disclosing the records to the defendant when the complainant waived the statutorily protected confidentiality of her mental health records (Conn. Gen. Stat. § 52-146d (2008)). The Connecticut Supreme Court relied on statutory law and previous decisions regarding disclosure of medical records.

In *Esposito*, the court set forth the procedure for the disclosure of confidential records, ruling that there must be reasonable ground to believe that the failure to produce the privileged information is likely to impair the defendant's right of confrontation. The court may then conduct an *in camera* inspection of the information and turn over to the defendant any relevant material for the purposes of cross-examination. If consent is not provided, then the witness may risk having his or her testimony struck from the record. The court found that there would be a "substantial likelihood that complainants would not provide the state with access to their confidential records if the automatic effect of that decision would allow unfettered access to those records, including by an alleged perpetrator" (*Kemah*, p 860). In *State v. Palladino*, 796 A.2d 577 (Conn. App. Ct. 2002), the court found that the broad, unqualified terms of the waiver in that case and the supporting statements made it abundantly clear that the complainant agreed to allow both parties to have access to her psychiatric records. In the absence of any indication that the complainant had intended to limit disclosure, the trial court had no further gate-keeping function.

In this case against Mr. Kemah, the complainant expressly limited disclosure to a single identified party: in the first two releases, to the police for purposes of a "criminal investigation" and, in the third release, to the office of the state's attorney, albeit without expressly limiting the purpose for which the state could use the records. The court found that the omission of a stated purpose for the release to the state's attorney does not render the release one of a general, unqualified nature, like the one in *Palladino*. It found nothing under state statute that provides that the failure to designate both a person and use results in a complete waiver of confidentiality. If both components were mandatory, it is more likely that the consent would be rendered invalid than constitute a complete waiver of privilege. The court also found there was no authority to support the proposition that Mr. Kemah had a right to have her confidential records produced directly to him, even when the complainant's credibility is central to the case. The state was not simply seeking to block disclosure of the complainant's mental health records, it was seeking to ensure that the prosecution's legal obligation to "investigate fully the veracity of a witness' potential testimony to determine if that witness should testify" was not unduly hampered.

In summary, the Supreme Court of Connecticut reversed the trial court's decision ordering disclosure of certain of the complainant's mental health records without following the procedures under *State v. Esposito*, and the case was remanded for further proceedings. Upon remand, the trial court was required to ascertain whether, and to what extent, the complainant consented to disclose her records. The Supreme Court deferred judgment on Mr. Kemah's claim regarding the state's timeliness and compliance with its discovery obligations pursuant to *Brady v.*

Maryland. It also found that whether he had the right to have the trial court, and not the state, review the complainant's records to determine whether they contain exculpatory materials fell outside the scope of the certified question.

Discussion

This review of *State v. Kemah* highlights the perpetual struggle to balance the protected patient-doctor privilege with the constitutional right of a defendant to confront the accuser. Two types of protected information surface in this case, the complainant's sexual and mental health history. The complainant in this case had a history of manic episodes that could include impaired judgment and hypersexual behavior. Both sexual history and mental health history are protected to various degrees under both state and federal statutes. As a forensic psychiatrist, review of a litigant's mental health history can be critical in helping prepare a case and effective examination for both the defense and the prosecution. As treating psychiatrist, one may be in the position of releasing confidential information through records or testimony that could be damaging to a patient's legal case.

Courts are reluctant to establish evidentiary privileges, because unlike other evidentiary rules, they do not serve to improve the reliability of evidence for the fact finder. Generally, in order for a privilege to be established, it must be shown that communications originate in a confidence that they will not be disclosed and that confidentiality is essential to maintenance of the relationship between the parties. It has been generally accepted by courts that effective mental health treatment depends on such a privilege and that consent from the patient to disclose is required. The elements of consent include a designated party to whom the information will be released, a description of the type of information, and the purpose for which the information will be released. However, waiver of privilege exists in certain circumstances, such as when a litigant puts his mental health at issue, since privilege cannot be both a sword and a shield.

In 1961, Connecticut was the first state to adopt psychotherapist-patient privilege, and this statute became a model for other states and eventually the federal government (Goldstein AS, Katz J: Psychiatrist-patient privilege: the GAP proposal and the Connecticut statute. *Am J Psychiatry* 118:733–9, 1962). The boundaries of privilege were tested in California in *In Re Lifschutz*, 467 P.2d 557 (Cal. 1970), where Dr. Lifschutz was imprisoned for refusing to obey a trial court's order to answer questions and produce records regarding his former patient. While the Connecticut Supreme Court in this case confirmed that privilege is not absolute, it also illustrated in its reasoning that the real test for admissibility of privileged information is relevancy of information. The United States Supreme Court officially recognized a "psychotherapist privilege" under the Federal Rules of Evidence in *Jaffee v. Redmond*, 518 U.S. 1 (1996), and extended the scope to include physicians, psychologists, and social workers. Further safeguards on patient confidentiality have been enacted on the federal and state levels through "rape shield laws" and the Health Insurance Portability and Accountability Act (HIPAA).

In 1978, Congress enacted Rule 412 of the Federal Rules of Evidence, which states that evidence offered to prove that an alleged victim engaged in other sexual behavior and evidence offered to prove any alleged victim's sexual predisposition is generally inadmissible. Thus, in sexual assault trials (with some exceptions), the complainant cannot be cross-examined about his/her sexual past, and evidence of the complainant's prior sexual conduct cannot be introduced. These rape shield laws have been adopted in all 50 states and raise multiple constitutional issues. They may preclude defendants charged with rape from exercising the right to confront the accuser, which may violate the defendant's right to a fair and impartial trial. The accuser, however, has the directly competing right to privacy. These constitutional privileges create an inherent tension between the two parties in a criminal case.

In 1996, the United States Congress passed HIPAA which defines protected health information (PHI). Under HIPAA, nonauthorized release of PHI is permitted (but not necessarily required) under certain circumstances, such as in an emergency; in cases involving abuse; when requested by law enforcement or a court; or when necessary to prevent a serious and imminent physical threat to a person or the public. The caveat to this disclosure under HIPAA is the "minimum necessary" rule, which requires that the holder of the information not use, disclose, or request a person's entire medical record, unless it can specifically justify that the entire record is reasonably needed. Thus, the Privacy Rule under HIPAA also prescribes a "gate-keeping" role to psychiatrists. Of

course, a state may pass legislation that affords the individual more rights to privacy. Thus, HIPPA provides a floor for the protection of health information and privacy may be even more tightly controlled, depending on the rules of the state in which a psychiatrist practices.

If a patient who is involved in a legal matter gives consent to release mental health records, there may be harmful or irrelevant information in the record, and so the treating psychiatrist may be required to determine the minimum necessary information to include. If the records are ordered by the court, then the psychiatrist may be relieved of this gate-keeping role, which can become problematic when the treating psychiatrist is asked to release records from a forensic hospital and a dual agency arises. This point is where the *in camera* review process or "gate-keeping" role of the judge, highlighted in this case, becomes a potential safeguard against inappropriate and indiscriminate use of sensitive and confidential health information.

This discussion highlights two critical but often overlooked facts regarding privilege and confidentiality in a legal matter:

> Treating psychiatrists are required to release confidential information only when it is court-ordered. An attorney-issued subpoena is not a court order. When a patient authorizes consent, HIPAA grants permission for, but does not require, disclosure.
>
> When information is to be released, privilege limits the scope of information to that which is material and relevant to the specific matter at hand in the legal proceeding.

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Mental Health Considerations for Asylum

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Mental Illness, Availability of Psychiatric Medication, and Need for Psychiatric Medication May Be Considerations in Decisions About Whether to Grant Asylum

In *Kholyavskiy v. Mukasey*, 540 F.3d 555 (7th Cir. 2008), the U.S. Court of Appeals for the Seventh Circuit reviewed the decisions of the immigration judge (IJ) and Board of Immigration Appeals (BIA), both of whom denied Mr. Kholyavskiy's request for asylum. In reviewing these decisions, the appeals court considered several matters related to mental health presented by Mr. Kholyavskiy.

Facts of the Case

Mr. Kholyavskiy, a native of the Soviet Union, was subjected to humiliation and physical abuse as a child because of his religion. When he started school, he was required to identify himself as Jewish every three months. Other children called him "kike." They urinated on him repeatedly. They pulled down his pants, exposing his genitals, and taunted him for being circumcised. He reported incidents of physical abuse, including a broken arm and a serious dog bite that required a series of forty rabies shots. Mr. Kholyavskiy's family received telephone calls threatening a pogrom. The family found Stars of David scratched into their mailbox.

In 1992, Mr. Kholyavskiy's family was granted refugee status in the United States. He was 15 years old at the time. He suffered severe social anxiety, panic attacks, and depression. Soon after, he began to have trouble with the law, which resulted in commencement of removal proceedings in May 2001. Although Mr. Kholyavskiy had been in mental health treatment for several years, he did not begin to benefit from medication until 2003. He took Paxil and Klonopin, which allowed him some functional recovery. Over the course of the proceedings, Mr. Kholyavskiy required hospitalization after an acute psychotic breakdown.

At his hearing before the IJ in 2005, Mr. Kholyavskiy petitioned for asylum. He presented evidence that he had undergone past persecution and had reason to fear future persecution. His treating psychiatrist testified that Mr. Kholyavskiy would suffer serious harm upon returning to Russia, including inability to obtain his medication, psychotic breakdown because of separation from his family, and an inability to take care of himself.

The IJ found that Mr. Kholyavskiy's prior harassment did not rise to the level of persecution defined