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## The Justice Mission and Mental Health Law

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# THE JUSTICE MISSION AND MENTAL HEALTH LAW

STEVEN R. SMITH<sup>1</sup>

Mental health law's concern with justice, so much a part of the discussion of civil commitment, the insanity defense and other traditional mental health subjects, has been a neglected subject in one important area. Malpractice claims against mental health professionals commonly are slow, expensive and embarrassing for the professional and the injured. Processing these claims creates great stress on plaintiffs and defendants alike. The distress caused to defendants has, to some degree, been discussed.<sup>2</sup> The more profound effects that the system of public lawsuits can have on plaintiffs have not received sufficient attention. To pursue a malpractice claim, plaintiffs in such cases are required to reveal extraordinarily private matters in a public forum. This process is inconsistent with the most basic values and concepts of the mental health disciplines. Whether viewed from the insights of therapeutic jurisprudence, as Professor Wexler has suggested,<sup>3</sup> or in terms of simple justice, the current malpractice process is unnecessarily harmful to injured plaintiffs.

A just and compassionate system for reviewing mental health malpractice claims should strive to: (1) protect patient privacy; (2) conclude claims quickly and efficiently; (3) promote consistent and predictable resolution of claims; (4) assure that decisions conform to announced legal principles and the best available science; and (5) encourage mental health practitioners to engage in high quality and ethical practice. The current system of public trials clearly does not succeed in meeting these goals in many cases.<sup>4</sup>

The spectacle of patient secrets being revealed publicly as the result of a malpractice case is inconsistent with the goals of the mental health professions. Confidentiality and the obligation to maintain patient secrets have been

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<sup>2</sup>See, e.g., SARA C. CHARLES & EUGENE KENNEDY, DEFENDANT: A PSYCHIATRIST ON TRIAL FOR MEDICAL MALPRACTICE 210-24 (1985) (exploring the chilling effect on the practices of those physicians threatened by malpractice claims); E. Donald Shapiro, *Book Review*, 31 N.Y.L. SCH. L. REV. 867, 867 (1986) (refusing to find the legal profession at fault for the medical malpractice crisis).

<sup>3</sup>See DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (1992); David B. Wexler, *Justice, Mental Health, and Therapeutic Jurisprudence*, [this symposium].

<sup>4</sup>These principles, of course, are important in processing all malpractice cases. They are critical in mental health malpractice where extremely private information is involved.

hallmarks of the mental health professions. These professions have stressed that confidentiality is essential to successful therapy and to patient well-being.<sup>5</sup>

Psychotherapy requires that patients reveal the most sensitive information about themselves and their families. Patients often disclose information they would not share with anyone else. Therapy deals not only with factual information that can be embarrassing, but also with the most intimate fantasies, fears, and anxieties. In short, mental health malpractice cases will reveal information surrounding the most private details of the patient's life. So sensitive and personal is this information, that there has been broad agreement that a psychotherapist-patient privilege is justified even though a general medical or health care privilege is not.<sup>6</sup>

The public nature of malpractice cases means that extremely personal patient information will not merely be revealed *in camera*, but will be available to others. Not only will the information elicited at trial be disclosed, but considerably more information will be revealed during the discovery process. The breadth of discovery in civil cases leaves little information about the mental health of the patient beyond potential inspection.<sup>7</sup> Additionally, discovery is not limited to information held by the mental health professional against whom

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<sup>5</sup> See, e.g., GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, CONFIDENTIALITY AND PRIVILEGED COMMUNICATION IN THE PRACTICE OF PSYCHIATRY 92 (1960) ("There is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment . . . . A threat to secrecy blocks successful treatment"). All mental health professions include in their code of ethics a confidentiality provision. Several studies have considered the importance of confidentiality from a utilitarian perspective with somewhat mixed results. See, e.g., Daniel W. Shuman & Myron F. Weiner, *The Privilege Study: An Empirical Examination of Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893, 926 (1982) (concluding that confidentiality is required for building trust); Steven R. Smith, *Medical and Psychotherapy Privileges and Confidentiality: On Giving With One Hand and Removing With the Other*, 75 KY. L. J. 473, 547-49 (1987) [hereinafter *Medical and Psychotherapy Privileges and Confidentiality*] (asserting that current statutes do not adequately support confidentiality in psychotherapy).

<sup>6</sup> See, e.g., Proposed Rules of Evidence, Rule 504, reprinted in 56 F.R.D. 183, 240-41 (1972) (providing for a psychotherapist-patient privilege); JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE §§ 2285, 2380a (J. McNaughton ed., 1961 & Supp. 1988) (discussing general principles and policies behind privileges); *Medical and Psychotherapy Privileges and Confidentiality*, supra note 5, at 546-49 (asserting the importance of protecting confidentiality through a privilege).

<sup>7</sup> See Ralph Slovenko, *Psychotherapist-Patient Testimonial Privilege: A Picture of Misguided Hope*, 23 CATH. U. L. REV. 649 (1974). The very nature of discovery is to allow fishing expeditions to determine what information may be relevant at trial. The discovery process, therefore, results in the examination of much more information than will be actually used at trial. It is often very difficult to ensure that information requested in discovery is relevant until after it has been released to the opposing party. Thus, the discovery exceptions to the privilege have left little or no protection for the psychotherapist-patient relationship. *Id.*

the malpractice case is filed. The plaintiff's mental condition before seeing the professional may be relevant to determine whether malpractice caused the injury. As a result, much of the information from prior psychotherapy may be relevant and is, therefore, discoverable. Furthermore, the mental health and treatment of the patient subsequent to any malpractice is usually relevant to the question of damages, so information from that subsequent treatment will probably be discoverable. Thus, virtually the entire mental health history of the plaintiff may be revealed during the mental health malpractice case.<sup>8</sup>

The difficulty facing plaintiffs is illustrated by an injured patient harmed by a therapist's actionable breach of confidentiality. To pursue such legal claims, plaintiffs must undertake lawsuits which will inevitably require that they publicly reveal considerably more about their emotional conditions than their negligent therapists ever revealed. Ironically, the patients' lawsuits may exacerbate the very harm for which they seek compensation.

Psychotherapist-patient privileges will not protect the patient's sensitive information during a malpractice case. The patient-litigant exception destroys the privilege because the plaintiff brings his or her own mental conditions into question by filing the suit.<sup>9</sup> Thus, a potential malpractice plaintiff faces the unhappy choice of giving up a potentially legitimate claim for damages or agreeing to reveal large amounts of very sensitive personal information.

Plaintiffs who bring mental health malpractice claims often must relive publicly their most troubling experiences. Like the rape victim who is forced to confront the attacker, describe publicly the experience, and (in days past) disclose prior sexual history, injured mental health malpractice plaintiffs must agree to have the most private aspect of their lives examined, explained, attacked, and viewed in public. Furthermore, the plaintiffs who undertake this emotionally difficult process are people whose emotional difficulty and fragility probably caused them to seek psychotherapy in the first place.

Attorneys representing mental health plaintiffs often appear insensitive to the harm and pain that vigorously pursuing a mental health claim may cause the plaintiff. The plaintiff may be harmed by the emotional stress of prolonged proceedings, the release of private information, and the need to confront a formerly intimately trusted mental health professional. The standard personal injury approach may promote the legal interests of the plaintiff in a technical sense while seriously harming the person's general welfare. In many cases, the overall interests of clients may be better served with a less legalistic due process

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<sup>8</sup> *Id.*; See Steven R. Smith, *Constitutional Privacy in Psychotherapy*, 49 GEO. WASH. L. REV. 1, 52-53 (1980) [hereinafter *Constitutional Privacy*].

<sup>9</sup> A patient waives the patient-litigant privilege when she brings her own mental condition into question. See *Constitutional Privacy*, *supra* note 8, at 52-53. Courts have universally accepted the exception to avoid the unfairness of allowing a person who raises mental condition questions to hide behind the privilege in order to prevent opposing parties from obtaining the information necessary to challenge the claims. *Id.*

approach in exchange for a faster and less public resolution of mental health disputes. Mental health malpractice litigation does not produce a sense of justice and compassion, nor is it consistent with the goals and values of the mental health or legal professions.

Because of the problems of the civil trial system in mental health malpractice cases, optional forums such as investigative panels and binding arbitration should be available to the injured mental health patient. The mental health professions might establish professional compensation funds to which those injured by the serious misconduct of a member of the profession could apply for assistance. An interdisciplinary panel composed of mental health professionals, attorneys, and others would investigate cases and then determine what compensation or restitution was appropriate. Such an approach is distinguished from other proposals that would make such panels mandatory.<sup>10</sup> This proposal is to use panels solely at the option of the plaintiff for the same reasons that the confidentiality of therapy exists at the option of the patient—it is the patient's personal information that requires protection.

Mental health patients should also have binding arbitration available as an additional nonjudicial option with which to pursue mental health malpractice claims. Thus, as a matter of legal right, injured patients would have the option of either binding arbitration or the special investigative panel described above, as an alternative to a civil lawsuit against mental health professionals. At the same time, no mental health professional or institution should be permitted to require that a patient agree, prior to an injury, to use the panel to resolve any claims or to enter into a binding contract limiting the patient's choice of forum.

The conventional wisdom suggests that panels and arbitrators are less sympathetic to plaintiffs, or at least give lower awards, than juries. Although plaintiffs as a group have not done that well in jury trials in mental health cases,<sup>11</sup> it is probably true that in some cases (particularly where there has been outrageous conduct or grievous injury) juries may give higher awards. In those cases, plaintiffs could choose the usual civil jury trial. More importantly, however, plaintiffs could rationally choose a nonjury option even assuming it meant the possibility of a lower award. The benefits of maintaining the privacy of their mental health information and the ability to quickly conclude the claim in a less threatening environment may well outweigh the chance of a higher economic award. Furthermore, from the plaintiff's perspective, the efficiencies of the options may reduce the total costs of pursuing a claim and offset some of the possible economic disadvantages of the informal mechanisms.

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<sup>10</sup> See, e.g., Kirk R. Johnson *et al.*, *A Fault-Based Administrative Alternative for Resolving Medical Malpractice Claims*, 42 VAND. L. REV. 1365, 1379 (1989) (proposing mandatory panel for deciding malpractice claims).

<sup>11</sup> See, e.g., JEFFREY D. ROBERTSON, *PSYCHIATRIC MALPRACTICE: LIABILITY OF MENTAL HEALTH PROFESSIONALS* 5 (1988) (maintaining that the majority of mental health malpractice claims result in favorable verdicts for the defendant).

This conventional wisdom often causes plaintiffs' attorneys to object to nonjury determinations of liability and damages. They might, therefore, be expected to advise many plaintiffs not to opt for the arbitration or investigative panel. In mental health cases, however, this may be bad advice in light of the *total* interests of the plaintiff, as opposed to the plaintiff's interest in wringing every last dollar out of a case. As a sophisticated mental health bar develops, perhaps it will become more sensitive to the harm that mental health malpractice plaintiffs can suffer from the process of preparing for and going through a public trial.

The legal system has been insensitive to the harm it inflicts on mental health patients who pursue malpractice claims. Too often even patients' lawyers have also ignored the potential for harm. Because the current system conflicts with the most fundamental values of the mental health professions themselves, those professions should take the lead in reforming the processing of mental health claims, or at least offer alternative forms which are more nearly consistent with the values and principles of mental health care.

