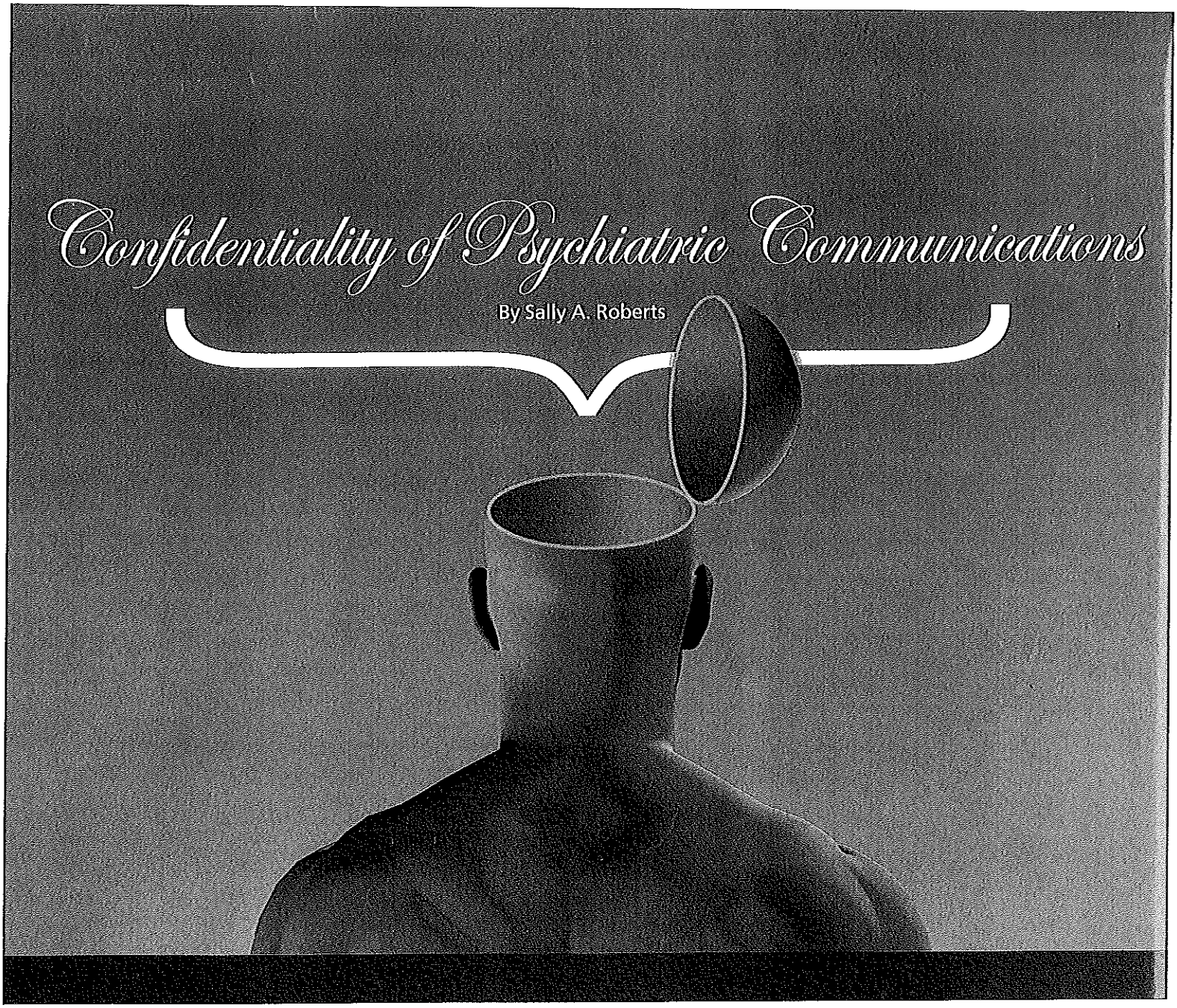
Confidentiality of Psychiatric Communications

By Sally A. Roberts



The Connecticut Supreme Court has stated that "the people of this state enjoy a broad privilege in the confidentiality of their psychiatric communications and records....The primary purpose of the privilege is to give the patient an incentive to make full disclosure to a physician in order to obtain effective treatment free from the embarrassment and invasion of privacy which could result from a doctor's testimony....Accordingly, the exceptions to the general rule of nondisclosure of communications between psychiatrist and patient were drafted narrowly to ensure that the confidentiality of such communications will be protected unless important countervailing considerations require their disclosure."[1]

Connecticut has several statutory privileges covering patients and mental health professionals.[2] These privileges apply to oral and written communications and records relating to diagnosis and treatment between the patient as well as the patient's family and the mental health professional. In order for the privilege created by the statutory scheme to apply, the purpose of the communication must be diagnosis and treatment.[3]

There was no physician-patient privilege at common law. Critics of this privilege questioned its ability to enhance communication. The patient's primary goal in consulting a physician is to be cured, not the future legal implications of the conversation. This is distinguishable from an attorney-client relationship where legal consequences are foremost in a client's mind.

The first physician-patient privilege was introduced by statute in New York in 1828.[4] Since then, almost every state has followed suit, including Connecticut.[5] Given the questionable justification for this privilege, it is notable that the federal judiciary has not adopted a physician-patient privilege. Faced with a privilege having questionable theoretical underpinnings, the judiciary has been able to resist creating a new privilege, while state legislatures have not.

A waiver of the privilege is required, by either the patient or the patient's authorized representative, before a mental health professional may disclose privileged communi-

cations or records in judicial or administrative proceedings.[6] A waiver of portions of mental health records do not imply waiver of the entire record.[7]

Under certain statutory exceptions, however, consent to disclosure is not required. All the privileges contain exceptions allowing disclosure in order to protect the health or safety of the patient or another individual. The disclosure varies depending on the level of danger present.[8]

In a civil proceeding, there are two statutory exceptions where communications between patients and their psychiatrists may be disclosed without consent. Conn. Gen. Stat. § 52-146f provides:

> (5) Communications or records may be disclosed in a civil proceeding in which the patient introduces his mental condition as an element of his claim or defense, or, after the patient's death, when his condition is introduced by a party claiming or defending through or as a beneficiary of the patient and the court or judge finds that it is more important to the interests of justice that the communications be disclosed than that the relationship between patient and psychiatrist be protected.

The burden is on the party seeking to establish waiver of the privilege that justice requires admission of the patient's records.[9]

In a criminal proceeding, the defendant has a constitutional right to cross-examine state witnesses, which may include impeaching or discrediting them by attempting to reveal to the jury a witnesses' biases, prejudices, or ulterior motives, or facts bearing on the witnesses' reliability, credibility, or sense of perception. Thus, in some instances, otherwise privileged records must give way to a criminal defendant's constitutional right to reveal to a jury facts about the witness' mental condition that may reasonably affect that witness' credibility.[10]

The linchpin of the determination of a defendant's access to a witness' confidential records is whether they sufficiently disclose material, especially probative of the ability to comprehend, know, and correlate the truth so as to justify a breach of their confidentiality.[11] A trial court will generally inspect the records in-camera in order to make a determination as to their probative value. If the court determines that the records are probative, the State must obtain the witness' further waiver of his privilege concerning relevant portions of the records for release to the defendant, or the witness' testimony will be stricken.[12]

For purposes of balancing a witness' privilege to keep certain records confidential against the defendant's rights under the Confrontation Clause,[13] if the court discovers no probative and impeaching material during its in-camera review of the records, the entire record of the proceeding must be sealed and preserved for possible appellate review.

If a therapist testifies freely on direct examination concerning the complainant's narrative of an alleged sexual assault, and thereafter invokes the physician-patient privilege when questioned by the defendant as to wholly separate communications with the complainant, the court should conduct a voir dire of the therapist to ascertain whether the complainant had shown, during her contacts with the therapist, any mental abnormality that might have reflected upon the credibility of her accusation against the defendant.[14] A voir dire for the purpose of determining whether psychiatric personnel have information relating to the mental condition of a witness that might affect his testimony must be conducted in the courtroom in the presence of the defendant and his counsel, who shall be allowed to participate in the proceeding. The public, however, may be excluded while the voir dire is conducted.[15] **CL**

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Notes

1. *Skakel v. Benedict*, 1999 Conn. Super. LEXIS 3070 (Citation omitted; internal quotation marks omitted). *See generally* "Privilege, in judicial or quasi-judicial proceedings, arising from relationship between psychiatrist or psychologist and patient," 44 A.L.R.3d 24; "Psychother apist-patient privilege under federal common law," 72 A.L.R. Fed. 395; Rebecca S. Auerbach, "New York's Immediate Need for a Psychotherapist-Patient Privilege Encompassing Psychiatrists, Psychologists, and Social Workers," 69 Alb. L. Rev. 889 (2006).
2. These include the following provisions of the Connecticut General Statutes: 52-146o (physician, surgeon or health care provider-patient); 52-146c (psychologist-patient); 52-146d (psychiatrist-patient); 52-146k (sexual assault counselor-victim); 52-146m (interpreter-deaf communicant); 52-146p (marriage counselor); 52-146q (social worker-patient); and 52-146s (licensed professional counselor-patient). The privilege established in 52-146d includes communications and records relating to the diagnosis or treatment of an alcohol-related disorder. *See Skakel v. Benedict*, 54 Conn. App. 663, 670-80 (1999).
3. *See 1-P Connecticut Trial Evidence Notebook* P.38.
4. *See generally*, "Creating Evidentiary Privileges: An Argument for Judicial Approach," 31 Conn. L. Rev. 771 (1999).
5. *See, e.g.*, "Privilege Arising from Relationship between Psychiatrist or Psychologist and Patient," 44 A.L.R.3d 24.
6. Conn. Gen. Stat. §§ 52-146c(b), 52-146(e), 52-146k(b), 52-146p(b), 52-146q(b) and 52-136s(b).
7. *State v. Pierson*, 201 Conn. 211, 222-23 (1986), *cert. denied*, 489 U.S. 1016 (1989).
8. Compare § 52-146f(2) (psychiatrist may disclose if a substantial risk of imminent physical injury present), with § 52-146o(c)(2) (marital or family therapists may disclose if a clear and present danger to health and safety exists).
9. *Berglass v. Berglass*, 71 Conn. App. 771, 787 (2002).
10. *State v. D'Ambrosia*, 212 Conn. 50, *cert. denied*, 493 U.S. 1063 (1989).
11. *State v. Slimskey*, 59 Conn. App. 341, *cert. granted in part*, 254 Conn. 938, *rev'd in part*, 257 Conn. 842 (2000). For instance, in *State v. Kelly*, 208 Conn. 365 (1988), the court held that records of a sexual assault victim's psychiatric therapy and counseling following a prior alleged assault were not sufficiently probative so as to warrant breach of confidentiality.
12. *State v. Peeler*, 271 Conn. 338 (2004).
13. The Sixth Amendment right of confrontation and right to counsel is made applicable to the states through the Due Process Clause of the Fourteenth Amendment.
14. *State v. Pierson*, 201 Conn. 211 (1986).
15. *Id.*