

#2016-014

To: NH Supreme Court Advisory Committee on Rules
From: Joshua L. Gordon, Esq.
Date: December 15, 2017
RE: Disclosure of mental health records in court cases

After our discussion last week about "*in camera* review," I have been thinking about how this issue might be analyzed.

It seems to me that there are seven discrete disclosure possibilities, which I have listed below in the order of least-disclosure to most-disclosure:

1. Complete ban on disclosure of mental health records, doctor-patient privilege totally sacrosanct;
2. Judge only, sees them in chambers;
3. Judge only, sees them in chambers, but with memos, memos having been submitted by the parties, who are blind to the contents of the records;
4. Judge sees them in chambers, but with memos, memos having been submitted by the parties attorneys, the parties' attorneys having seen the records;
5. Judge sees them in chambers, accompanied by the parties' attorneys;
6. Judge sees them in chambers, accompanied by the parties' attorneys, the attorneys having been informed by their clients, who have also seen the records;
7. Judge sees them in open court, full disclosure, doctor-patient privilege disregarded.

Moving from one level of disclosure to the next involves a decision point. Thus, for the seven discrete disclosure levels, there are commensurately six discrete decision-making junctures. Each of these junctures necessarily involves:

- A. A list of considerations informing the decision-point; and
- B. Assignment of the burden of proof for each of those considerations.

Regardless of disagreements regarding what level of disclosure that should be sanctioned, I am hoping this list might aid our analysis.

In addition, we have been referring to this issue as "*in camera* review." Because several of the disclosure possibilities do not involve *in camera* review, I think the issue ought to be renamed, perhaps forthrightly, "disclosure of mental health records in court cases."