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Judicial Assault on Child Victims: An Unintended Impact of Child Protection Laws

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JUDICIAL ASSAULT ON CHILD VICTIMS: AN UNINTENDED IMPACT OF CHILD PROTECTION LAWS

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Dedicated to L.S. and A.L.G., whose cases were the catalyst for this Article

I. PROLOGUE

This Article explores statutory and case law which address the question of disclosure of medical records pertaining to physical and psychological evidence in cases involving adult victims, child victims and the accused in a variety of settings. Inconsistent results in Colorado give rise to the concerns expressed in this Article. Specifically, both child and adult victims have a right to assert a privilege and prevent disclosure of their confidential medical records when a case is brought in the criminal setting. If, however, a case is brought in the context of a dependency and neglect (D and N) proceeding or a criminal case *subsequent* to a report of abuse made under the Children's Code, the privilege appears not to exist. Additionally, even though the statute appears to also eliminate the privilege for the alleged perpetrator, in practice, only the child's records are sought. One is left with the question of why the Children's Code, the purpose of which is to protect children, provides this class of victims with the least protection in judicial proceedings.[1]

These problems first come to light when social services attorneys or District Attorneys (representing the county or state) and parents' defense attorneys in D and N custody or criminal cases request or subpoena medical records from health care institutions and professionals without proper consent.[2] Whether to produce these records or to assert the patient's privilege is an extremely difficult decision for the provider because there is conflicting guidance in the law. An improper disclosure can have grave consequences for the subject of the records;[3] not to men-

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1. For an excellent in-depth discussion of protected communications, see Robert Weisberg & Michael Wald, *Confidentiality Laws and State Efforts to Protect Abused or Neglected Children: The Need for Statutory Reform*, 18 FAM. L.Q. 143 (1984).

2. The authors caution members of the bar, health care providers and record custodians that a subpoena only triggers the question of whether disclosure is proper; it does *not* obviate the need for an appropriate consent, court order or determination that consent is unnecessary. Otherwise, testimonial privileges, *see* COLO. REV. STAT. § 13-90-107 (1987 & Supp. 1991), would be meaningless whenever a subpoena issued for such information.

3. Stauffer v. Karabin, 492 P.2d 862, 864 (Colo. Ct. App. 1971) (the physician-pa-

tion the risk to the integrity of the legal proceeding[4] and the provider who makes the wrong choice.[5]

Disclosure of medical records in response to a request or subpoena is not determinative of whether the records will be admissible as evidence in the subsequent judicial proceeding. However, the health care professional's obligation to assert the patient's privilege attaches at the point of the initial request for disclosure, and the law will provide protection at this point.[6] This Article focuses on the disclosure quandary, although admissibility of records are discussed where pertinent. The tensions between privilege and disclosure are addressed below in the context of D and N, criminal, civil and domestic relations (custody) cases. The inconsistency of outcomes is explored and suggestions for a more uniform approach are made below.

II. Dependency and Neglect Cases

Cases of abuse, ill treatment, physical or medical neglect of children are regulated by the Colorado Children's Code.[7] In these cases, county departments of social services or local law enforcement agencies investigate reports of suspected abuse or neglect.[8] Often medical records are sought in order to establish the nature of the child's injury, abuse, neglect or trauma (mental or physical). The Code is silent as to whether such records are to be disclosed to the investigators by health care providers or records custodians. Individual professional licensing laws generally prohibit disclosure.[9] The Children's Code, however, abrogates these privileges such that communications between a minor patient and provider are admissible as evidence in any case resulting from a report of child abuse or neglect.[10] The statutory language is broad enough to

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tient relationship and information acquired from that relationship are extremely private matters for which a high degree of protection is warranted).

4. *See, e.g., id.* at 865 (improper admission of testimony which could have influenced the verdict is reversible error).

5. For example, unauthorized release of confidential information may result in civil liability for invasion of privacy, Levias v. United Air Lines, 500 N.E.2d 370, 374 (Ohio Ct. App. 1985); Drake v. Covington County Bd. of Educ., 371 F. Supp. 974, 978 (M.D. Ala. 1974), as well as criminal liability, *see* Colo. Rev. Stat. § 18-4-412(1), (3) (1986 & Supp. 1991) (unauthorized disclosure of medical records is a class 6 felony theft); Colo. Rev. Stat. § 25-4-1409(20) (Supp. 1991) (unauthorized release of HIV information is a misdemeanor).

6. Clark v. District Court, 668 P.2d 3, 8 (Colo. 1983) (once medical communications privileges attach, they prohibit both pretrial discovery of information as well as testimonial disclosure). *See also* Domako v. Rowe, 475 N.W.2d 30 (Mich. 1991).

7. Colo. Rev. Stat. §§ 19-3-101 to -702 (Supp. 1991), see especially definitions in § 19-3-102(1) (Supp. 1991).

8. *Id.* § 19-3-308(1).

9. *See* Colo. Rev. Stat. § 13-90-107(1)(g) (1987) (privilege for psychologists and persons working under the supervision of a psychologist); *id.* § 13-90-107(1)(d) (1987 & Supp. 1991) (protected communications with physician, surgeon or registered professional nurse); *id.* § 12-43-218(1) (1991) (nondisclosure by psychologists, social workers, marriage and family therapists, professional counselors and certified school psychologists).

10. Colorado Revised Statute § 19-3-311 provides that such communications are not privileged evidentiary matter:

The incident of privileged communication between patient and physician, be-

address communications and observations of both physical and psychological harm. If the privilege cannot bar testimony, it follows that the records may properly be disclosed in advance of the judicial proceeding,[11] and therefore production in response to a request or subpoena appears to be authorized, if not compelled, by the statute.

This abrogation of the patient's right to assert a privilege as to testimony about certain communications is a companion to the statutory duty of providers to report suspected child abuse.[12] However, the identity of the "patient" in this statute is ambiguous: is it the victim or the accused or both? The presumed purpose of this abrogation is to enhance the reporting of child abuse and to prevent the accused from hiding behind the privilege and thereby conceal admissions or physical evidence needed to determine what happened to the child.[13] On the other hand, the respondent often seeks the child's records in order to establish the child's lack of credibility, propensity to not tell the truth, or to give inconsistent accounts. In these cases, the alleged perpetrator, who should not be permitted to hide his or her *own* conduct behind the shield of privilege, seeks to use the statutory exemption to the *child's* privilege as a sword, to attack and undermine the child's testimony.

In the authors' experience, however, this section is relied upon by attorneys and providers to justify disclosure of a child's entire medical record.[14] This paradox thwarts society's desire to protect the child[15] and instead exposes the minor victim to further assault in a judicial forum, either in person through cross examination or by proxy if a professional testifies about the victim's statements as a permitted exception to the hearsay rule.[16]

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tween patient and registered professional nurse, or between any person licensed pursuant to article 43 of title 12, C.R.S. [psychologists, social workers, therapists and other counselors], or certified school psychologist and client, which is the basis for a [abuse or neglect] report [required to be filed] pursuant to section 19-3-304, shall not be a ground for excluding evidence in any judicial proceeding resulting from a [filed] report . . . .

COLO. REV. STAT. § 19-3-311(1) (Supp. 1991).

11. *See* Clark v. District Court, 668 P.2d 3, 11 n.7 (Colo. 1983) (where a party intends to present testimony as to mental or physical condition, the substance of such testimony may be required to be disclosed prior to trial). *See* Jett v. State of Florida, WL 226466 (Fla. Dist. Ct. App. 1991) (permitting defendant's discovery of child victim's communications with therapist under similar statute).

12. COLO. REV. STAT. § 19-3-304(1) (Supp. 1991).

13. *See, e.g., In re* O.L., 584 A.2d 1230 (D.C. 1990) (disclosure of mother's past mental health records); *In re* M.S., 569 N.E.2d 1282 (Ill. App. Ct. 1991) (mother's medical records admissible in termination case); *In re* Baby X, 293 N.W.2d 736 (Mich. Ct. App. 1980) (mother's drug treatment records disclosed in addicted infant D & N case); Commonwealth v. Arnold, 514 A.2d 890 (Pa. Super. Ct. 1986) (defendant convicted of sexual assault was not permitted to assert privilege for inculpatory communications to a social worker).

14. The betrayal of trust by disclosure of a child's statements about a parent with whom the child still seeks a healthy relationship subjects the child to substantial distress. *See* Weisberg & Wald, *supra* note 1, at 211 n.215; Bond v. District Court, 682 P.2d 33, 39-40 (Colo. 1984).

15. *See* COLO. REV. STAT. § 19-1-102 (Supp. 1991) (generally, the legislative declarations of the general assembly demonstrate an intent to advance the welfare and best interests of an abused or neglected child).

16. A proxy is a professional who testifies about the child victim's statements in lieu of

It is important to note at this juncture that the authors assume, for purposes of this Article, that D and N cases involve injury allegedly caused by persons related to or known by the child, because the respondents in these proceedings are parents who have either caused harm to the child or have failed to protect a child from harm by another. In D and N cases therefore, the child's testimony often is to be used against the parent. How is the need for information in a proceeding to establish mistreatment or neglect of a child to be balanced with the child's need to confide in a health care professional and begin the process of physical and psychological recovery? Where the victim's physical or mental condition is a crucial component of such proceedings, evidence of same appears to be appropriate. The Colorado Court of Appeals has held there was no physician's privilege as to physical evidence because a report to Social Services constituted an automatic waiver.[17]

There do not appear to be any published Colorado cases addressing production of a child's post trauma mental health treatment records in a D and N proceeding.[18] In Colorado the statutory waiver provides the basis for disclosure of such records to Social Services and this seems proper at the investigative stage. However, disclosure to respondents and/or evidentiary use by the parties at hearing subjects the child to betrayal of those confidences which the privilege was intended to and should continue to protect, just as in the case of an adult victim.[19]

If the respondent seeks records of the child abuse investigation by the county social services agency or other social services records, an *in camera* evaluation has been held to be appropriate.[20] If these files contain the child's mental health records, the authors contend a hearing rather than an *in camera* inspection is required. There exits a virtually unknown and certainly under-utilized statute which establishes a hearing procedure to determine whether mental health records should be released[21] in the absence of a valid consent or other specified circum-

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the child's testimony. In Colorado, such testimony has been allowed through use of the residual hearsay exception (COLO. R. EVID. 803(24) (Supp. 1991)). *See* Oldsen v. People, 732 P.2d 1132, 1136 (Colo. 1986) (child's hearsay statements related by psychologist, physician and social worker had sufficient circumstantial guarantees of trustworthiness to support admission).

17. *In re* T.S. and T.M., 781 P.2d 130, 132 (Colo. Ct. App. 1989), *cert. denied*, Oct. 10, 1989, (automatic waiver of mother's privilege).

18. In D and N cases from other states, the courts have denied fathers' requests for Social Services and mental health records of a child. *E.g.*, *In re* D.G., 416 A.2d 77 (N.J. Super. Ct. App. Div. 1980). Courts have also denied requests for a child's statements made to a treating therapist. *E.g.*, *In re* Daniel C.H., 269 Cal. Rptr. 3d 624 (Ct. App. 1990). Such access has also been denied in delinquency cases. *E.g.*, *In re* L.P., 593 A.2d 393 (N.J. Super. Ct. Ch. Div. 1991) (notes of school psychologist protected by confidentiality).

19. *See* Bond v. District Court, 682 P.2d 33, 39-40 (Colo. 1984) (protective orders may be issued when appropriate to prevent disclosure of communications); *infra* Section III, discussion regarding criminal cases.

20. People v. District Court, 743 P.2d 432, 436 (Colo. 1987) (*in camera* review required where the accused party who seeks access has proven an exception to confidentiality applies).

21. Colorado Revised Statute § 27-10-120(1) provides as follows:

> Except as provided in subsection (2) of this section [disclosure of information regarding a criminal defendant or crimes], all information obtained and records

stances.[22] This shall, for purposes of this Article, be referred to as a "27-10-120" hearing. This statute requires a hearing of which the *subject* of the record and the *custodian* must be given notice (in compliance with the Colorado Rules of Civil Procedure) and an opportunity to appear.[23] The authors theorize that the purposes of requiring notice to the custodian are twofold: first, to allow for assertion of privilege and, second to give notice to the treating professional. The latter may then also attend the hearing and offer testimony to the court about the potential harm to the subject and/or an ongoing therapeutic relationship if the pertinent records were to be disclosed. This may not always occur in a hearing on a motion for protective orders under Rule 26(c) of the Colorado Rules of Civil Procedure. The further value of a 27-10-120 hearing is the unique necessity of notice to the *subject* of the record, which is not required in a hearing on a motion to quash a subpoena (in which the court is asked to prevent disclosure of documents or testimony). This allows the subject, the party most affected by the outcome, to be present and place his or her consent or opposition to disclosure on the record. This statute is not restricted in its applicability to any particular kind of proceeding;[24] its definitions are broad and cover any mental health services.[25] It would seem very appropriate to use the 27-10-120 proceeding whenever a request for disclosure of a child's mental health records is received. The child can be represented and the custodian/provider can be present to fully advise the court as to the impact of disclosure on the child.

At this point, the question of consent to release the minor's mental health records must be considered, since existence of a valid consent moots the privilege issue and obviates the need for a hearing. Ordinarily a parent has legal authority to consent to the release of his or her child's records.[26] However, in a D and N proceeding, the interests of the parent and the child often conflict. For this reason, the respondent parent's consent should not be sufficient for disclosure,[27] especially

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> prepared in the course of providing any services under this article [care and treatment of the mentally ill] to individuals under any provision of this article shall be confidential and privileged matter. Such information and records may be disclosed only . . . To persons authorized by an order of the court after notice and opportunity for hearing to the person to whom the record or information pertains and the custodian of the record or information pursuant to the Colorado rules of civil procedure . . . .

COLO. REV. STAT. § 27-10-120(1), (1)(f) (1989).

22. *See id.* §§ 27-10-120(1)(a)-(e), (g)-(h) (which permit disclosure to other providers, payors, researchers, courts reviewing commitments and families of adult patients).

23. One New York court denied a motion to compel the release of confidential records for lack of notice to the records custodian. Susan W. v. Ronald A., 558 N.Y.S.2d 813 (Sup. Ct. Queens County 1990).

24. When this arises in the criminal context, it assumes constitutional dimensions. *See infra* notes 46-51 and accompanying text.

25. *See* COLO. REV. STAT. § 27-10-102(1) (1989).

26. Ann Sayvetz, *Consent to Treatment and Access to Minors' Medical Records*, 17 COLO. LAW. 1323, 1324 (1988).

27. Despite the provisions of section 27-10-120(1.5), which permit parent access to the mental health records of the minor child. *See* COLO. REV. STAT. § 27-10-120(1.5) (1989).

where the contents of the records may be used to attack the child's credibility as a weapon in parent's defense. In other words, the release of the child's information to the parents may well promote the self interest of the parent; not the best interest of the child.[28] The child's interest in nondisclosure is more compelling than that of the adult, based on the potential threat to the child's physical and emotional well being.

If the parent in a D and N case is not able to act in the best interests of the child, who is? The Guardian Ad Litem (G.A.L.) who is appointed in D and N cases would appear to play this role.[29] The G.A.L. may assert the child's privilege to bar disclosure of records.[30] However, it is not clear whether the G.A.L. may waive it, since unlike the child's legal guardians, the G.A.L. has no authority to make treatment or placement decisions for the child. If Social Services has been granted temporary legal custody, the agency could provide a valid consent to release records to the parents. However, the authors submit that obtaining a judicial opinion ordering disclosure after a 27-10-120 hearing, which encourages provider input, is the wiser course.

If the court is to resolve the matter of disclosure of the child's records, what standard is to be applied? The courts could look to the already established statutory standard for a patient's access to his or her own hospital records: access to notes or psychological records may be denied if inspection would have a significant negative impact on the patient.[31] This procedure would be consistent with the fundamental purpose of a child protection system.

Sometimes, the facts of a D and N case appear to establish criminal conduct and a criminal case is filed. The respondent/defendant faces proceedings in two different settings with different disclosure and discovery rules. The Children's Code not only abrogates the privilege in D and N cases, but in "any judicial proceeding resulting from a report pursuant to this part 3 . . . ."[32] At present, the victim's mental health records are often available to the parent respondent in the D and N case under social services' broad discovery policies. The parent-defendant in the criminal case may already have obtained the records in the D and N case, or may seek them directly in the criminal case under the provisions of C.R.S. § 19-3-311. The existence of this statutory language explains the dearth of Colorado cases addressing disclosure of a child's mental health records in these circumstances.

Since the language of the Children's Code is ambiguous, the question of access to records where the D and N respondent is the "patient"

28. For a discussion of D & N cases where the parent's interests are elevated above the child's, see David C. Hoskins, *Representation of D & N Respondents: A Balanced Approach*, 21 COLO. LAW. 49 (1992).

29. COLO. REV. STAT. § 19-1-111(1) (Supp. 1991).

30. *See id.* § 19-3-203(3).

31. COLO. REV. STAT. § 25-1-801(1)(a) (1989). The authors believe the opinion required by this statute as to the significant negative impact of release of records may be supplied either by the child's therapist or an expert appointed by the court.

32. *See* COLO. REV. STAT. § 19-3-311(1) (Supp. 1991) (*See supra* note 14 for the full text of this section).

must be addressed. In one unreported Colorado case experienced by the authors, the trial court asked the mother to waive the privilege to her records; in the absence of such waiver, the court drew negative inferences as to the mother's psychological condition. Arguably, the Colorado statute eliminates the privilege, and a waiver by the parent should not be necessary for disclosure. Although the statute seems to permit it, the authors are concerned that treatment records of a D and N respondent are seldom sought. Admissions of an alleged perpetrator should not be shielded by the adult's assertion of a privilege with the provider, who is otherwise obligated to report suspected abuse. Cases from other jurisdictions have held that the privilege yields to the paramount interests of the child.[33] Full disclosure of such admissions clearly support the statutory intent to protect the child.[34]

III. CRIMINAL CASES

When an adult is the victim of an assault and evidence of *physical* harm is to be used, a waiver (either explicit[35] or implied[36]) is required. Medical records reflecting post-trauma mental health treatment of an adult victim are privileged and not subject to disclosure to the alleged perpetrator in a criminal case.[37] This is true whether the provider is a psychiatrist, psychologist, nurse or social worker.[38] Testimony about the assault and the fact that counselling took place does not constitute a waiver, and an *in camera* review of the records by the court has been held to be inappropriate.[39] The burden of establishing a waiver is on the party seeking to overcome the privilege and the application of the privilege does not violate the defendant's right of cross examination.[40]

Where a child is the victim of an assault by a stranger, the case is usually reported directly to the police, prosecuted solely as a criminal case and is not the subject of a report under the Children's Code. Therefore, the abrogation of privilege in the Children's Code does not apply, and the child's privilege now remains intact under the state criminal statutes. Before 1988 the statute on sexual assault on a minor child stated there was no victim-patient and physician privilege.[41] In 1988, the reference to "victim-patient and physician privilege" was deleted (for any crimes committed after July 1, 1988), thereby resurrecting the

33. *See supra* note 13.

34. To this end, there is also no spousal privilege in child abuse cases. *Id.* § 19-3-311(2); *see also* People v. Corbett, 656 P.2d 687, 688-89 (Colo. 1983) (applying former COLO. REV. STAT. § 19-10-112 (1973) in denying spousal privilege).

35. *See* Rohda v. Franklin Life Ins. Co., 689 F. Supp. 1034, 1039-40 (D. Colo. 1988).

36. Clark v. District Court, 668 P.2d 3, 8 (Colo. 1983).

37. People v. Silva, 782 P.2d 846, 850 (Colo. Ct. App. 1989).

38. *See* statutes cited *supra* note 9.

39. *Silva*, 782 P.2d. at 850.

40. Application of the privilege does not violate a defendant's right to confrontation. *People v. District Court*, 719 P.2d at 726-27 (construing COLO. REV. STAT. § 13-90-107 (1)(g)(Supp. 1985)).

41. COLO. REV. STAT. § 18-3-411(5) (1986). There is no ambiguity as to identity of the privilege holder in this statute; the defendant's privilege is not involved.

privilege.[42] Today, in the case of criminal assault, there is a privilege protecting the child's records, and the stranger is denied access; but the relative who commits an assault reported under the Children's Code may gain access to the child's post-trauma psychological records in the companion criminal case.[43] This inconsistency is contrary to the public policy of "child protection",[44] and legislation is needed to remedy this patently differential treatment.[45]

The privilege pertaining to a child's physical harm may be handled independently from that of psychological treatment. In one Colorado case, the mother waived the privilege for the hospital records of her child's physical examination, but the court held that such explicit waiver did not include a waiver of the psychologist-patient privilege for treatment at the Kempe National Center for Prevention and Treatment of Child Abuse.[46] The child's psychological condition was not an element of the crimes of sexual assault and sexual assault on a child. Therefore there was no implicit waiver. There is a danger of ignoring this distinction when both types of treatment are provided at one institution, and reflected in a single medical record.

A corollary issue is raised by testimony of a professional about a criminal assault in lieu of the child victim, under C.R.E. 803(24),[47] the residuary hearsay rule. So long as the scope of testimony is restricted to "what happened" as opposed to the rehabilitative process of the child, the substitute testimony should *not* be deemed a waiver such that all mental health records would be disclosed.[48] The contrary results in an unconscionable choice: either the child faces the trauma of testifying or where testimony is inappropriate, disclosure of confidences resulting in great harm to the therapeutic process.[49]

The issue most frequently highlighted in such a case is the *defend-*

42. COLO. REV. STAT. § 18-3-411(5) (Supp. 1991). An argument could be made, at least in sexual assault cases, that the privilege restored to the child-victim pursuant to the 1988 amendment of section 18-3-411(5) overruled the 1987 Children's Code abrogation of privilege in section 19-3-311(1) under the rules of statutory construction: where statutes are irreconcilable, statute passed later in time prevails. COLO. REV. STAT. § 2-4-206 (1980). The amendment to section 18-3-411(5) was passed in 1988 (1988 Colo. Sess. Laws 713), while the Children's Code was repealed and reenacted in 1987 (1987 Colo. Sess. Laws 695).

43. *See* COLO. REV. STAT. §§ 19-3-311, -308, -303(4.7) (Supp. 1991).

44. *See generally id.* § 19-1-102(1)(a)-(d) (legislative declarations to promote welfare and interests of children).

45. This problem has not gone unrecognized by courts addressing similar legislation. *See* Jett v. State of Florida, WL 226466, at *3 (Fla. Dist. Ct. App. 1991) (Sharp, J., dissenting) ("[A] close relative who rapes a child will have the benefit of requiring disclosure of the child's statements to his or her psychotherapist, but a stranger who rapes a child under similar circumstances will have no such right. Such an anomalous and unequal application of the law should be avoided.").

46. People v. Pressley, 804 P.2d 226, 228 (Colo. Ct. App. 1990).

47. *See supra* note 16.

48. White v. Illinois, 112 S. Ct. 960 (1992) (the Supreme Court approved the admissibility of testimony of adults recounting the four year old child's statements about a sexual assault under established exceptions to the hearsay rule, and rejected the defendant's Confrontation Clause challenge).

49. See cases cited *supra* note 18.

ant's constitutional right to confrontation.[50] In the 1987 case of *Pennsylvania v. Ritchie*,[51] the United States Supreme Court found that protection of a child's records did not violate the accused's right to confrontation. The Court did, however, require an *in camera* review of the child's records after which only that information that was exculpatory was to be disclosed to the defendant. In 1984, Illinois passed a statute providing an absolute privilege for statements made to rape crisis personnel.[52] The Illinois Supreme Court found the statute did not violate the defendant's rights to due process or confrontation, and upheld the trial court's refusal to conduct an *in camera* hearing to examine the communications.[53] Legislation such as that in Illinois should be considered in Colorado and elsewhere. In the meantime, the authors contend that 27-10-120 hearings offer greater protection for the child, in part to avoid the temptation for overworked judges to disclose the entire record, rather than engage in the time consuming task of *in camera* review.[54]

We now turn to the question of the criminal defendant as "patient" in a case arising from a report to Social Services. This in part involves the question of fairness of disclosure of confidential information of victim, defendant, neither or both. Where the defendant's medical condition is not an element of the crime, there is a privilege and a waiver is required.[55] However, if the criminal case arose out of a report under the Children's Code, at least under the current law, there may *not* be a privilege such that the District Attorney should be able to obtain and introduce admissions and observations contained in the defendant's medical records.[56] This may not, however, extend to records of court ordered therapy under a treatment plan for sexually abusive parents.[57] Further, in criminal cases of assault on a child, there is no spousal privi-

50. U.S. CONST. amend. VI. *See* Ebrahim J. Kermani, *The U.S. Supreme Court on Victimized Children: The Constitutional Rights of the Defendant versus The Best Interest of The Child*, 30 J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY, 839, 840-42, (1991); *see also* People v. Reidout, 530 N.Y.S.2d 938, 944 (Sup. Ct. Bronx County 1988) (court must balance the competing interests between witness confidentiality in psychiatric records and defendant's right to confrontation).

51. 480 U.S. 39 (1987) (5-4 decision, distinguishing Davis v. Alaska, 415 U.S. 308 (1974), which disapproved the trial court's prohibition of cross-examination on the issue of a witness's prior juvenile record, which was privileged under state law, as a violation of the defendant's constitutional right to confront witnesses).

52. ILL. CODE CIV. PROC. § 8-802.1 (1985).

53. People v. Foggy, 521 N.E.2d 86 (Ill.), *cert. denied*, 486 U.S. 1047 (1988).

54. This was the experience of one author following production to the court of a child's psychiatric record.

55. *Cf.* People v. Bowman, 812 P.2d 725 (Colo. Ct. App. 1991) (defendant's patient-psychologist privilege was upheld under COLO. REV. STAT. § 13-90-107(1)(g) (1987)). The court noted, however, that in Children's Code cases after 1989, statutory amendments would dictate the opposite result, since psychologists and social workers had been added to the class of providers whose privilege was abrogated. *Bowman*, 812 P.2d at 728-29.

56. Credit for this idea is owed to the mother of a child, who, upon being informed by hospital counsel that her child's records would probably be disclosed to the defendant accused of sexually assaulting her daughter, without consent, asked why her ex-boyfriend's group therapy records recounting his admission of the assault would not be available in the criminal case. *See also supra* note 45.

57. *See* People v. District Court, 731 P.2d 652, 657 (Colo. 1987).

lege,[58] and one parent may have to testify about the other's inculpatory statements.

IV. Civil Cases

In civil cases, parties are entitled to assert a privilege for protection of medical records, unless the information is the basis of a claim or affirmative defense (including emotional distress).[59] This includes drug and alcohol records, which may only be disclosed with consent or a court order.[60] Where mental health records are sought (other than for a court ordered evaluation) in any civil matter, it should be presumed by the provider that the physician/psychologist/social worker privileges apply.[61] A 27-10-120 hearing should be utilized, especially where the patient has or had an expectation of confidentiality.[62]

The status of the medical communications privilege is less clear in custody proceedings. The Colorado Uniform Dissolution of Marriage Act[63] creates a right of access to the child's medical records for a parent who has joint legal,[64] but not physical, custody at the time of the medical records request "[n]otwithstanding any other provisions of law to the contrary."[65] However, the "notwithstanding" clause arguably supports a right of disclosure to a consenting parent whose parental rights have been terminated. This is patently contrary to the social aims of child protection, and the statute needs to be amended to make explicit the right of access applies only in the cases of joint custody.

V. Violation of Equal Protection?

It appears from the above discussion that disclosure of medical information, physical and psychological, varies with the situation. A child victim of an assault by a stranger or any adult victim has a privilege for post trauma mental health records, but a child assaulted by a relative or person known to the child, which is reported under the Children's Code, does not. This is an unfortunate and unintended byproduct of the statutes designed to protect children. It may well rise to the level of constitutional infirmity: a violation of these children's right to equal protection of the laws.

Equal protection of the laws is guaranteed by the federal constitu-

58. Colo. Rev. Stat. § 13-90-107(1)(a)(II) (Supp. 1991).

59. Clark v. District Ct., 668 P.2d 3, 9-10 (Colo. 1983). Of course, counsel for the parties will be aware of whether the privilege has been waived because a medical condition is the basis of a claim or defense, but the provider receiving the request for records will not know this. For optimal certainty in these situations, counsel should obtain consent or a judicial determination that the privilege has been waived *before* requesting records from the provider.

60. 42 U.S.C. §§ 290 dd-3, ee-3 (1988).

61. Colo. Rev. Stat. § 12-43-218(1) (1991).

62. *Id.* § 12-43-214(1)(d)(4).

63. Colo. Rev. Stat. § 14-10-101 (1987 & Supp. 1991).

64. *See* Colo. Rev. Stat. § 14-10-123.5(1) (1987) (defining joint custody).

65. *See id.* § 14-10-123.5(7).

tion.[66] Generally, the state may not classify groups of persons similarly situated and treat those classes differently unless the classification is rational and furthers a legitimate state interest.[67] If the affected right is a fundamental one, or a suspect class has been created, the legislation must pass a much more rigorous test of judicial scrutiny.[68] Where the state has declared that the purpose of the Children's Code is "[t]o secure for each child subject to [the Code's] provisions such care and guidance . . . as will best serve his welfare and the interest of society,"[69] and where the application of privilege laws affords the least protection to this class of children, a court may find the situation deserving of heightened scrutiny. Of three groups similarly situated (victims of assault), one group (minors reported under the Children's Code) has no ability to protect their confidences necessary for rehabilitation and treatment, unlike the other two groups (adults and minor victims of assault by strangers). This disparity and unequal treatment may not withstand a constitutional challenge, and should therefore be remedied by legislative or judicial action. In the meantime, the use of 27-10-120 hearings should result in more equitable and uniform treatment.

VI. Proposed Solutions

The authors recommend the following actions to remedy the inequities detailed above:

a) Custodians of records and professionals should oppose requests for production of a child victim's mental health records except to Social Services in the context of an investigation. If any mental health records are subpoenaed, the attorney issuing same should be promptly told of the provider's objection, advised of 27-10-120 procedure, and if the matter cannot be informally resolved, a motion to quash should be filed. The custodian should notify and involve providers in the hearing to testify about potential damage to the child and the therapeutic relationship based on disclosure. Treatment by psychiatrist, psychologist, social worker or school counsellor should be handled uniformly. Notice of request for disclosure should be given to parents/legal guardians and the child.

b) As long as the current law stands, district attorneys, county attorneys and *guardians ad litem* should consider the use of 19-3-311 to obtain records of respondents and/or defendants in D and N or criminal cases arising from reports under the Children's Code. Admissions may be contained therein.

c) District attorneys should use 18-3-411(5) to protect children from disclosure of psychiatric or psychological treatment records in

66. U.S. Const. amend. XIV, § 1.

67. United States v. Moreno, 413 U.S. 528, 533 (1973).

68. For a recent discussion of equal protection analysis by the Colorado Supreme Court, see State v. Defoor, 824 P.2d 783 (Colo. 1992) (applying federal law; the Colorado constitution does not contain an equal protection clause).

69. Colo. Rev. Stat. § 19-1-102(1)(a) (Supp. 1991).

cases arising outside the Children's Code setting. Also, district attorneys should argue that disclosure of the victim's records is inappropriate in cases of substitute testimony under Colorado Rules of Evidence 803(24).

d) Social Services agencies need to refuse disclosure to D and N respondents of a child's mental health records unless the court so orders after a 27-10-120 hearing. Colorado Revised Statute sections 19-1-113 and 114 may be cited as a basis for seeking initial orders against disclosure.

e) Judges and attorneys should recognize the applicability of the 27-10-120 hearing procedures to production of any mental health records (whether in D and N, criminal, domestic or civil cases) and use such hearings (with notice to the custodian of records and the subject of the records) to resolve questions of disclosure and privilege.

f) Legislation is needed to clarify the Children's Code to (1) abrogate the alleged perpetrator's privilege, (2) restrict disclosure of a child's medical records to those portions relevant to the reportable injury suffered by the victim, and (3) specifically preserve the child's privilege as to post trauma psychological records so as to treat children in D and N cases the same as child and adult victims in criminal cases. The latter could partially be achieved by changing the language from "any judicial proceeding resulting from a report pursuant to this part 3 . . ." to "any proceeding *brought* pursuant to this part 3 . . . ." At a minimum, this would limit access to and use of the child's records to D and N cases, and not permit access in a companion criminal case. Also the Illinois statute establishing absolute privilege for communications to rape counsellors could be considered for adoption in Colorado and elsewhere.[70]

VII. EPILOGUE—CASE STUDIES: DEMANDS FOR PRODUCTION OF CONFIDENTIAL INFORMATION

You represent a hospital where a child has been treated for non-accidental injuries which may include sexual assault. The child has also received post-trauma mental health treatment. Reports of suspected abuse have been made to the local social services agency. The hospital is served with *subpoena duces tecum* to produce all of the child's medical records to:

a) the attorney for the parents in a dependency and neglect proceeding;

b) attorney for the father in a criminal case for sexual assault against his minor child;

c) attorney for the suspect unrelated to the child in a criminal case for sexual assault;

d) attorney for same defendant in a civil case brought by the child's parents for injury and emotional distress.

70. *See supra* notes 52 & 53.

Are the records to be produced or should a motion to quash be filed? Is the "medical" portion of the records to be handled differently than the "mental health" portion? What notice, if any, is given to the child's providers (medical and mental health) that records are being sought? Is there any difference in outcome if the child has been seen by a psychiatrist, psychologist or social worker? What notice, if any, is given to parent/legal guardian that records are being sought? What notice to the child? Is a hearing needed? Is *in camera* review of records necessary?

e) Alternatively, you represent a healthcare provider who has treated or counselled the parent or defendant who has provided information about the abuse or assault. The district attorney, county attorney, or child's attorney or G.A.L. subpoenas records. Are they to be produced? Is notice, consent and/or a hearing required?

The authors recommend the following responses to the situations presented in the case studies:

a) The parents in a D and N proceeding should be able to obtain their child's medical treatment records pertaining to any reported injury, either from the provider or Social Services. Other psychological records should not be produced unless a 27-10-120 hearing results in a finding that disclosure would not have a significant negative impact on the child.

b) The father accused of sexual assault in a criminal case may receive records pertaining to the child's injuries which are also an element of the crime with which he has been charged. However, an objection to disclosure of any other records, including post trauma treatment, should be made by provider and guardians and G.A.L.s, based upon privilege and equal protection claims.

c) Defendant (stranger to the child) should not be able to obtain any mental health records under C.R.S. § 18-3-411(5).

d) Civil case: only those records pertaining to issues in the case. If emotional harm is a basis for a claim for damages, those records may be ruled to be discoverable after a 27-10-120 hearing or Rule 26(c) motion for protective orders.

e) The records of the accused may be subject to discovery without consent in a D and N or companion criminal case. In all other cases, a 27-10-120 hearing should be employed.