The Illinois Mental Health and Developmental Disabilities Confidentiality Act: Lest We Forget the Search for the Truth

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"But it will hardly be said, that a man's sufferings will be greater, at seeing evidence to his prejudice extracted from another bosom, than at feeling it extracted from his own."

– Jeremy Bentham[1]

I. INTRODUCTION

The Illinois legislature promulgated the Mental Health and Developmental Disabilities Confidentiality Act (hereinafter "MHDDCA")[2] for the primary purpose of restricting the disclosure of all mental health records and communications,[3] and in an effort to

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1. 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 301 (John Stuart Mill ed., 1827) [hereinafter RATIONALE OF JUDICIAL EVIDENCE]. Congruent with eighteenth and nineteenth century British philosopher Jeremy Bentham's above belief on the value of privileges, Bentham believed that the "first and foremost objective of the judicial system was to accurately ascertain the truth." EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE – EVIDENTIARY PRIVILEGES § 2.5, at 113 (2002) [hereinafter THE NEW WIGMORE]. Accordingly, Bentham was "generally opposed to exclusionary rules of evidence," *id.*, and believed that most evidentiary privileges were "rubbish," *id.* at 115.

2. 740 ILL. COMP. STAT. 110 (2008).

3. 22 ILL. PRACTICE SERIES, THE LAW OF MEDICAL PRACTICE IN ILLINOIS § 28.8, at 1 (3d ed. 2008) [hereinafter ILLINOIS PRACTICE SERIES – MHDDCA § 28.8]. Illinois has additional statutes that create evidentiary privileges in other therapeutic situations, including 735 ILL. COMP. STAT. 5/8-802.1 (2008) (establishing confidentiality of statements made to rape crisis personnel)

streamline the confidentiality protections afforded to recipients of mental health and developmental disabilities services.[4] Though the MHDDCA applies both to records of persons with developmental disabilities and persons with mental illnesses, this Comment only addresses the MHDDCA's application to the latter.

The appropriate application of an evidentiary privilege is particularly important because privileges are in derogation of the truth.[5] As a result, privileges are not to be construed expansively;[6] and because it is the court's function to interpret such privileges,[7] they must be sure to do so in the most restrictive manner.[8] As this Comment will discuss, however, Illinois courts have broadly applied the privilege codified by the MHDDCA through an expansive construction of section 10(a)(1)'s language, which pertains to disclosure in civil, criminal, or administrative proceedings.[9]

In so doing, Illinois courts have interpreted section 10(a)(1) to require a strenuous standard of admissibility, an "at issue" standard versus the plain language "introduction" standard. As a result, the courts have

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and 735 ILL. COMP. STAT. 5/8-802 (2008) (establishing the privilege over communications between a physician and patient).

4. Reda v. Advocate Health Care, 765 N.E.2d 1002, 1010 (Ill. 2002) (noting that "the [MHDDCA] represents a comprehensive revision and repeal of previous statutes pertaining to psychotherapeutic communications"); Ill. Gen. Assemb., 80th Sess. Deb., at 63 (June 27, 1978), *available at* http://www.ilga.gov/house/transcripts/htrans80/HT062778.pdf [hereinafter *80th Sess. Deb.*] (statement of Rep. Richard Mugalian) (noting that "Senate Bill 255 [the Bill promulgating the MHDDCA] has attempted to consolidate the standards pertinent to confidentiality into one comprehensive law"); *see also infra* notes 90, 94, and 100 and accompanying text (discussing definitions of "recipient" and "services" under section 10(a)(1) and legislative history of the streamlining function of the MHDDCA).

5. Jaffee v. Redmond, 518 U.S. 1, 19 (1996) (Scalia, J., dissenting) (citing United States v. Nixon, 418 U.S. 683, 710 (1974)) ("Testimonial privileges, [this Court] has said, 'are not lightly created nor expansively construed, for they are in derogation of the search for truth.'").

6. *Id.*

7. The courts must interpret and apply statutes according to the doctrines of statutory construction, wherein "the principle concern is how appellate judges decide and justify their decisions in cases in which a statute may be applicable." Robert J. Martineau, *Craft and Technique, not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1, 5 (1993); *see also infra* Part V.B (discussing the established doctrines of statutory construction).

8. *Jaffee*, 518 U.S. at 19 (Scalia, J., dissenting) (citing United States v. Zolin, 491 U.S. 554, 568–70 (1989)) (stating that the scope of existing privileges is to be construed narrowly). Privileges are to be "strictly construed." Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250, 257 (Ill. 1982) (citation omitted); People v. Eveans, 660 N.E.2d 240, 246 (Ill. App. Ct. 1996); FMC Corp. v. Liberty Mut. Ins. Co., 603 N.E.2d 716, 718 (Ill. App. Ct. 1992); *see also infra* Part V.B (discussing rules of statutory construction as they pertain to the proposal to return to the plain language of the MHDDCA).

9. *See infra* Parts III.B, IV.A.3 (discussing the Illinois courts' interpretations of the MHDDCA and section 10(a)(1)).

prohibited the discovery of mental health records in situations in which the statute appears to allow disclosure.[10] Moreover, significant litigation has resulted from the need to interpret section 10(a)(1), particularly as the courts seek to balance competing interests: the court's truth-seeking function and the inhibitive nature of evidentiary privileges.[11] Accordingly, it is increasingly necessary to determine the proper scope of section 10(a)(1), particularly in light of the United States Supreme Court's recognition that a cognizable distinction exists between "at issue" and "introduction" standards of admissibility.[12]

In order to put into context the Illinois courts' interpretations of section 10(a)(1), a general background of privileges is necessary. Thus, Part II of this Comment will provide a broad discussion of privileges, as well as their function in the medical context.[13] Then, Part II will explain privileges in the mental health context.[14] Next, Part III discusses the history of the MHDDCA and the judicially created "fundamental fairness" doctrine of admissibility.[15] It then describes the Illinois precedent for the interpretation and application of section 10(a)(1), starting with an analysis of the "at issue" standard

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10. *See infra* Part IV.A.3 (showing the effect that the "introduction" standard may have had on cases previously using the "at issue" standard).

11. *See infra* Part III.B (discussing Illinois courts' application of the MHDDCA and section 10(a)(1)).

12. Shafer v. South Carolina, 532 U.S. 36, 54 (2001). In *Shafer*, this distinction between "at issue" and "introduction" was highly dispositive to the issue before the court. *Id.* The issue in *Shafer* was in part whether the criminal defendant's "future dangerousness" had been put at issue. *Id.* at 39. Defendant Shafer was convicted of murder, attempted armed robbery, and criminal conspiracy for which the prosecutor sought the death penalty. *Id.* at 40. In an effort to avoid the death penalty, Shafer sought a jury instruction under *Simmons v. South Carolina*, 512 U.S. 154 (1994), notifying the jury that a sentence of life imprisonment would not render him eligible for parole. *Shafer*, 532 U.S. at 41. Such an instruction, however, only applied if, in part, Shafer's "future dangerousness" was at issue. *Id.* at 39. Thus, one of the issues on appeal was whether Shafer should have received the instruction on the basis that his future dangerousness had been put at issue. *Id.* at 40–41. The Court noted that the prosecutor and defense counsel argued in the trial court about the definition of "at issue." *Id.* at 54. Specifically, the question was whether the defendant's future dangerousness was sufficiently put at issue by the prosecution's introduction of evidence of past crimes, or whether the prosecuting attorney had to affirmatively argue that the defendant's future dangerousness was at issue. *Id.* In recognizing that there was indeed a cognizable distinction between introducing something and placing something directly "at issue," the United States Supreme Court reversed and remanded back to the South Carolina Supreme Court for a determination of the extent to which the prosecution had introduced or placed at issue Shafer's propensity for future dangerousness. *Id.* at 54–55; *see also* United States v. First State Bank, 691 F.2d 332, 335–36 (7th Cir. 1982) (defendant did not place element of privilege at issue even though he introduced a claim of privilege).

13. *See infra* Parts II.A–B (discussing privileges both historically and in the medical context).

14. *See infra* Part II.C (discussing the federally recognized psychotherapist-patient privilege).

15. *See infra* notes 120–32 and accompanying text (discussing the fundamental fairness exception created by the Illinois Supreme Court's decision in *D.C. v. S.A.*).

overwhelmingly applied by the courts and using the Illinois Supreme Court's *Norskog v. Pfiel*[16] decision as an illustration.[17] Finally, Part III discusses the few cases that have appropriately applied the plain language "introduction" standard, with particular emphasis on the Illinois Supreme Court's *Goldberg v. Davis*[18] decision.[19]

Part IV will analyze the manner in which the Illinois courts have interpreted section 10(a)(1), highlighting the distinctions between the "at issue" and "introduction" standards.[20] By discussing the standards of evidentiary admissibility and the application of the "at issue" and "introduction" standards outside the context of the MHDDCA, Part IV underscores the gaps in the Illinois courts' prevailing interpretations of section 10(a)(1) and the perverse effect they have had on the judiciary's truth-seeking function.[21] Finally, Part V of this Comment proposes that the Illinois courts reassess the philosophical underpinnings of the MHDDCA and the psychotherapist-patient privilege.[22] Specifically, Illinois courts should follow statutory interpretation doctrines that require enhanced emphasis on the plain language of section 10(a)(1) and consideration of all the statute's provisions.[23]

II. BACKGROUND

Evidentiary privileges bar the admission of certain evidence, and under English and American jurisprudence, privileges have primarily developed under modern common law.[24] Though privileges initially

16. 755 N.E.2d 1 (Ill. 2001).

17. *See infra* Part III.B (discussing the Illinois courts' interpretation and application of section 10(a)(1)).

18. 602 N.E.2d 812 (Ill. 1992).

19. *See infra* Part III.B (discussing the Illinois courts' treatment of section 10(a)(1)).

20. *See infra* Parts IV.A.1–2 (discussing the "at issue" and "introduction" standards independent of the MHDDCA).

21. *See infra* Part IV.A.3 (highlighting pertinent gaps in the Illinois courts' interpretation of section 10(a)(1)).

22. *See infra* Part V.A (discussing criticisms of the psychotherapist-patient privilege and the need to reassess the underpinnings of the MHDDCA).

23. *See infra* Parts V.B–D (creating an incremental proposal for a revised construction of section 10(a)(1)).

24. THE NEW WIGMORE, *supra* note 1, at 92 ("Privileges are a relatively recent phenomenon in the history of the common law."). The early common law of evidentiary privileges has its roots in laws prohibiting persons believed to be "incompetent" from testifying at a trial. *Id.* The "incompetency rules" in turn reduced the need for courts to assess and create evidentiary privileges. *Id.* at 93. As the English jury system developed from information-producing jurors to information-seeking jurors, however, the use of non-juror testimony increased, *id.* at 95–96, and the courts began to examine the necessity for privileges "to enforce the legal system's right to every man's evidence . . . [and] protect[] certain types of confidential communications and information," *id.* at 100.

only applied to several select relationships,[25] their scope has expanded under the rationale that an increasing number of relationships and interactions are so important that without a privilege, the particular communication would be hampered, if not destroyed.[26] Thus, to understand the history of the MHDDCA, this Part will discuss privileges generally and within the contexts of medicine and psychotherapy as they apply in Illinois and federal courts.[27]

A. Privileges, Generally

In contrast to the majority of evidentiary rules seeking to promote the truth-seeking process,[28] privileges are specifically designed to inhibit the fact-finding process.[29] The rationale generally used to support privileges is that they protect important social interests by trading evidence for confidentiality[30] and encourage communications that,

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25. *Id.* at 105 ("[T]he early English common law recognized few privileges."); *see also infra* Part II.A (providing a general history of evidentiary privileges).

26. THE NEW WIGMORE, *supra* note 1, at 105 (noting that privileges are created based on the belief that "absent privileges, most laypersons would refrain from engaging in [these] desirable activities"). In determining whether or not to create privileges, privilege theory dictates that the courts must use a two-step process. *Id.* First, the court identifies socially useful relationships that "in the opinion of the community ought to be sedulously fostered." *Id.* (footnote omitted). Second, the court determines the extent to which the recognition of the privilege promotes the particular relationship at issue, often working under the assumption that "the average layperson is so fearful that the revelation will later come back to haunt him or her in litigation that he or she would not make the revelation without the assurance of confidentiality furnished by an evidentiary privilege." *Id.* at 105–06. Indeed, during the 1700s the courts began to recognize this theory of privileges as the prevailing rationale for many existing privileges such as the attorney-client or spousal privileges. *See id.* at 109–11 (noting that due to "concern[s] about the impact of the legal rule on the stability of the relationship . . . the new rationale posited a causal connection between the existence of the privilege and client behavior").

27. *See infra* Parts II.A–C (discussing the historical context of privileges, the physician-patient privilege in Illinois and under federal rules, and the federal recognition of the psychotherapist-patient privilege).

28. THE NEW WIGMORE, *supra* note 1, at 91 ("[T]he legal system 'has a right to every man's evidence.'") (citation omitted).

29. 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 72, at 339 (6th ed. 2006) [hereinafter MCCORMICK ON EVIDENCE]; *see also* Reda v. Advocate Health Care, 765 N.E.2d 1002, 1009 (Ill. 2002) (citing Norskog v. Pfiel, 755 N.E.2d 1 (Ill. 2001)) (stating that privileges "protect some outside interest other than the ascertainment of truth at trial"); D.C. v. S.A., 687 N.E.2d 1032, 1038 (Ill. 1997) (noting that privileges "are not designed to promote the truth seeking process, but rather to protect some outside interest other than the ascertainment of truth at trial"); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES: TEXTS, CASES AND PROBLEMS 759 (6th ed. 2008) [hereinafter EVIDENCE UNDER THE RULES] (noting that the purpose of a privilege "is to protect certain relationships and values, even if such protection imposes significant costs on the litigation process. [Its] effect in any given trial may be to impede the search for truth.").

30. MCCORMICK ON EVIDENCE, *supra* note 29, at 339.

without the privilege, would be difficult to facilitate.[31] Thus, by creating a privilege, legislatures or the courts intend to strike a balance between the judicial system's interest in assessing all relevant information and the desire to encourage the particular confidential relationship.[32]

Historically, privileges were limited to confidential communications between spouses,[33] attorney-client,[34] clergy-penitent,[35] and in the United States, the Fifth Amendment privilege against self-incrimination.[36]

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31. *Id.* at 339–40; *see also* Jaffee v. Redmond, 518 U.S. 1, 10 (1996) ("[T]he mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.") (footnote omitted).

32. Laurent v. Brelji, 392 N.E.2d 929, 931 (Ill. App. Ct. 1979) (citing *In re* Westland, 362 N.E.2d 1153, 1156 (Ill. App. Ct. 1977)) (noting that privileges are a balance "between the encouragement and protection of confidential relationships and the interest of disclosure of relevant information").

33. The spousal privilege is a privilege that has "received special legal protection" since early common law. THE NEW WIGMORE, *supra* note 1, at 104; *see also* Trammel v. United States, 445 U.S. 40, 53 (1980) (upholding privilege of spousal confidences but with the modification that "the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying"). In its modern form, the privilege protects two forms of spousal communication: adverse spousal testimony and spousal confidences. EVIDENCE UNDER THE RULES, *supra* note 29, at 819. The justification for the spousal privilege is in part the desire to "foster the harmony and sanctity of the marriage relationship." *Trammel*, 445 U.S. at 44.

34. The attorney-client privilege was the first evidentiary privilege to be recognized by English law and it is believed to have "developed roughly contemporaneously with the right to compulsory process." THE NEW WIGMORE, *supra* note 1, at 100. The attorney-client privilege only extends so far as the evidence was communicated in the course of legal services offered by the attorney and where the client had an expectation of confidentiality. EVIDENCE UNDER THE RULES, *supra* note 29, at 765, 773.

35. Although there is some controversy regarding the existence of the clergy-penitent privilege in old English law, literature suggests that the privilege at least existed at one point, though it appears to have disappeared in relatively modern English common law. THE NEW WIGMORE, *supra* note 1, at 465 n.193. Nonetheless, the privilege is now recognized by every U.S. state as well as U.S. federal common law. *Id.* at 465. Interestingly, the clergy-penitent privilege was the only privilege approved of by Jeremy Bentham—in stark contrast to his views that evidentiary privileges were "rubbish." *Id.* at 466; *see also supra* note 1 and accompanying text (discussing Jeremy Bentham's views on evidentiary privileges).

36. The Fifth Amendment provides in relevant part that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. Some scholars have explored the issue of the Fifth Amendment as it pertains to the disclosure of mental health information in criminal proceedings. *See, e.g.*, Barbara Gilleran-Johnson & Gloria A. Kristopek, *Post-Conviction Challenges to the Death Penalty: Mental Health Records and the Fifth Amendment*, 32 LOY. U. CHI. L.J. 425 (2001) [hereinafter *Post-Conviction Challenges*]. Specifically, Gilleran-Johnson and Kristopek underscore the intersection of the Fifth Amendment and the MHDDCA, and in particular, court-ordered psychiatric examinations. *Id.* at 442–43. Citing to the United States Supreme Court decision in *Estelle v. Smith*, Gilleran-Johnson and Kristopek indicate that the crucial question in determining whether the Fifth Amendment applies to court-ordered psychiatric examinations is the use of the information, and where "a psychiatrist had relied upon the defendant's . . . remarks[,] the State's later use of the psychiatrist's testimony

Illinois has recognized all of these privileges.[37]

With the exception of the Fifth Amendment privilege against self-incrimination, these early evidentiary privileges were aimed at protecting the confidential communication between two or more persons.[38] As this section will discuss, the general physician-patient privilege and the psychotherapist-patient privilege, in both the federal and Illinois contexts, have evolved within this idea of sacred confidential communications, and it is an important concept to acknowledge when assessing the Illinois courts' effectiveness in interpreting the MHDDCA.[39]

B. Privileges in the Medical Context, Generally

The history behind the physician-patient privilege is important to the discussion of the MHDDCA because this privilege served as the precursor to the MHDDCA.[40] As a result, the MHDDCA's textual deviations from the physician-patient privilege underscore the need to independently assess its applicability, and the history of the physician-patient privilege helps to illustrate the purpose and parameters of the MHDDCA. First, this section will discuss the physician-patient privilege as it is codified in Illinois, focusing on its similarities to the

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implicate[s] the Fifth Amendment." *Id.* at 443 (citing to Estelle v. Smith, 451 U.S. 454 (1981)).

37. *See, e.g.*, 735 ILL. COMP. STAT. 5/8-801 (2008) (spousal privilege); 735 ILL. COMP. STAT. 5/8-803 (2008) (clergy-penitent privilege); People v. Adam, 280 N.E.2d 205, 207 (Ill. 1972) (establishing the attorney-client privilege). Illinois common law recognizes other privileges. *See, e.g.*, People *ex rel.* Dep't of Prof'l Regulation v. Manos, 782 N.E.2d 237, 243–44 (Ill. 2002) (dentists constitute surgeons for purpose of physician-patient privilege); Thomas v. Page, 837 N.E.2d 483, 490–91 (Ill. App. Ct. 2005) (judicial deliberation privilege); *In re* Marriage of Daniels, 607 N.E.2d 1255, 1262–70 (Ill. App. Ct. 1992) (law enforcement investigatory privilege).

38. *See, e.g.*, *Trammel*, 445 U.S. at 45 (noting confidential bases of spousal privilege); *see also, e.g.*, EVIDENCE UNDER THE RULES, *supra* note 29, at 828 (noting that, for example, the spousal privilege is "based on 'the deepest and soundest principles of our nature,' suggesting that any inroad on the privilege would 'destroy the best solace of human existence'") (citation omitted). Congruent with these ideals of confidentiality, evidentiary privileges are also in part related to the individual constitutional right to privacy under the Fourth Amendment of the United States Constitution, though an elaborate discussion of this issue is beyond the scope of this Comment. *See In re* Marriage of Bonneau, 691 N.E.2d 123, 128 (Ill. App. Ct. 1998) (citing Whalen v. Roe, 429 U.S. 589, 605–06 (1977); Griswold v. Connecticut, 381 U.S. 479, 484 (1965); Family Life League v. Dep't of Public Aid, 478 N.E.2d 432, 434–36 (Ill. App. Ct. 1985)) (finding that in balancing the interest in confidentiality against the need for disclosure, "courts must also consider a party's constitutional right to privacy").

39. *See infra* Parts II.B, C (analyzing rationales for Illinois's physician-patient privilege and the federal psychotherapist-patient privilege).

40. *See infra* Part III.A.1 (citing to the original evidentiary act in Illinois, the Act of 1872, to which the physician-patient privilege was added prior to the promulgation of the MHDDCA).

current MHDDCA.[41] Then, this section will discuss the privacy protections within the federal context.[42]

1. The Physician-Patient Privilege in Illinois

Given that the predecessor to the MHDDCA evolved directly from the Illinois physician-patient privilege,[43] a discussion of this privilege is necessary to properly understand the MHDDCA's roots and evaluate whether Illinois courts are correctly interpreting the MHDDCA.[44] Congruent with the early models of evidentiary privileges,[45] the Illinois legislature first promulgated a physician-patient privilege in part based on the belief that creating a legally sanctioned confidential relationship would induce patients to seek comprehensive treatment.[46] Accordingly, the Illinois physician-patient privilege bars physicians and surgeons from disclosing any information obtained through the professional medical-patient relationship; however, it only prohibits the disclosure of information considered "necessary to enable [the physician] professionally to serve the patient."[47]

The physician-patient privilege further provides for certain exceptions that allow the disclosure of medical records. The exception most relevant to this Comment pertains to disclosure in civil, criminal, or administrative proceedings—disclosure is allowed where the

41. *See infra* Part II.B.1 (analyzing the Illinois physician-patient privilege).

42. *See infra* Part II.B.2 (analyzing the federal privacy protections).

43. *See infra* Part III.A.1 (discussing the history of the MHDDCA).

44. *See infra* Parts III and IV (discussing and analyzing the MHDDCA and the Illinois courts' interpretation of the privilege).

45. *See supra* notes 28–38 and accompanying text (citing to historical privileges and general rationales of maintaining confidentiality and encouraging communications).

46. 4A JERALD S. SOLOVY ET AL., ILLINOIS CIVIL LITIGATION GUIDE § 4.60 cmt. 1 (2009) [hereinafter SOLOVY, CIVIL LITIGATION] (citing Moore v. Centreville Twp. Hosp., 616 N.E.2d 1321, 1327 (Ill. App. Ct. 1993), *rev'd on other grounds*, 634 N.E.2d 1102 (1994)) ("The privilege was created to encourage full disclosure of all medical facts by a patient in order to ensure the best diagnosis and treatment for patients . . . ."). The first codification of the physician-patient privilege in Illinois was in 1959, when the Illinois "Act in regard to evidence and deposition in civil cases" of 1872 was amended. Act of 1872 § 5.1 (1959) (currently codified at 735 ILL. COMP. STAT. 5/8-802 (2008)) ("Physician or Surgeon disclosing information of patient"). The text of this privilege has not undergone any significant changes since its original promulgation.

47. 735 ILL. COMP. STAT. 5/8-802 (2008). Though this provision had been amended by Public Act 89-7, the Illinois Supreme Court subsequently found that Public Act unconstitutional in its entirety. Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1105–06 (Ill. 1997) (finding that because provisions of Public Act 89-7 pertaining to caps on non-economic damages were unconstitutional and the remaining provisions were not severable, the entirety of Public Act 89-7 was unconstitutional). New York and California were the first states to enact statutes codifying the physician-patient privilege in 1828 and 1878, respectively. Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 616 (1980) (citation omitted) [hereinafter *Privileges and Professionals*].

patient's physical (or mental, in actions preceding the MHDDCA) condition is "at issue."[48] This "at issue" language controlled disclosure of records pertaining to mental illness treatment until the addition of the early form of the psychotherapist-patient privilege in 1963.[49]

2. The Federal Privacy Protections

Though the general physician-patient privilege is well established in state practice,[50] the United States Supreme Court has not officially recognized it in the federal context.[51] Thus, the only common law medical provider-patient privilege recognized by the United States Supreme Court through Federal Rule of Evidence 501 is the psychotherapist-patient privilege.[52] Congress, however, created

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48. 735 ILL. COMP. STAT. 5/8-802 (2008). Because the physician-patient privilege also provides that in instances in which there is a conflict with the MHDDCA, the MHDDCA will control, *id.*, the physician-patient privilege will only be discussed insofar as it is the predecessor to the MHDDCA. For an application of this "at issue" provision as it pertains to the physician-patient privilege, see, e.g., *Kraima v. Ausman*, 850 N.E.2d 840, 846 (Ill. App. Ct. 2006) (holding that the "defendant did not affirmatively place his medical condition at issue simply because plaintiff alleged in the amended complaint that [defendant] was physically limited by arthritis when he performed the surgery").

49. *See infra* notes 84–88 and accompanying text (noting change in text of privilege from original notation to mental health records in the physician-patient privilege to the more specific § 5.2 of the first psychotherapist-patient privilege). The physician-patient privilege does not cover identifying information such as the name or address of the patient. 735 ILL. COMP. STAT. 5/8-802 (2008). Moreover, it is the burden of the party asserting the privilege to "show facts giving rise to the privilege." SOLOVY, CIVIL LITIGATION, *supra* note 46 (citing Giangiulio v. Ingalls Mem'l Hosp., 850 N.E.2d 249, 258 (Ill. App. Ct. 2006)). The physician-patient privilege extends to non-parties of litigation. Reagan v. Searcy, 751 N.E.2d 606, 610 (Ill. App. Ct. 2001). Records pertaining to AIDS or drug abuse and alcoholism testing or treatment, however, though not excluded from coverage under the general physician-patient privilege, are specifically covered by separate evidentiary privileges. Alcoholism & Other Drug Abuse & Dependency Act, 20 ILL. COMP. STAT. 301 (2008); AIDS Confidentiality Act, 410 ILL. COMP. STAT. 305/9-10 (2008). Accordingly, the existence of these independent statutes governing the confidentiality of such records has precluded the courts from finding alcoholism records covered by the MHDDCA. *See, e.g.*, Maxwell v. Hobart Corp., 576 N.E.2d 268, 270 (Ill. App. Ct. 1991) (finding that the legislature did not intend for "mental health services" to include alcoholism treatment and also finding that disclosure of those records is governed by the Alcoholism and Other Drug Dependency Act).

50. Ralph Reubner & Leslie Ann Reis, *Hippocrates to HIPAA: A Foundation for a Federal Physician-Patient Privilege*, 77 TEMP. L. REV. 505, 508, 564 n.439 (2004) [hereinafter *Hippocrates*] (citing to, for example, the Alaska, California, Michigan, Illinois, New York, and Texas statutes codifying the physician-patient privilege and noting that an "overwhelming majority" of states recognize a physician-patient privilege).

51. *Hippocrates*, *supra* note 50, at 507–08.

52. *Id.* at 509. In the federal judicial system, Federal Rule of Evidence 501 provides that the federal courts have the authority to create evidentiary privileges "in light of reason and experience." FED. R. EVID. 501. Accordingly, there is no federal statutory codification of evidentiary privileges. The codification of Rule 501 was the result of a long political struggle between Congress and the United States Supreme Court. FED. R. EVID. 501 advisory

"unprecedented protection"[53] for patient privacy of general medical treatment and communications[54] through the Health Insurance Portability and Accountability Act (hereinafter "HIPAA"),[55] and specifically, the regulations under HIPAA that are collectively referred to as the Privacy Rule.[56]

Congress promulgated HIPAA with the intent that it would serve as a baseline for patient privacy.[57] As such, one of HIPAA's purposes is to protect the confidentiality of health information as it is transmitted through and collected by electronic portals.[58] The Privacy Rule under HIPAA further protects patients' health information by protecting the use, distribution, and control of an individual's health information.[59] Though HIPAA contains a preemption provision,[60] the provision does not provide for preemption where a state law is more stringent than the privacy protections afforded in HIPAA.[61] Thus, because in Illinois the

committee's note. Indeed, although the Supreme Court had at one time expressly suggested the enactment of a psychotherapist-patient privilege, Congress rejected the specific statutory privileges and instead promulgated Rule 501 to serve as a flexible guide through which the federal courts could determine the applicability of common law privileges. EVIDENCE UNDER THE RULES, *supra* note 29, at 760. The difficulties with which Congress attempted to enact privileges, and the continued controversy in recognizing privileges, underscore the continuous need to assess the interpretation and application of evidentiary privileges.

53. *Hippocrates*, *supra* note 50, at 508.

54. The Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified in scattered sections of 42 U.S.C.).

55. *Id.*

56. Standards for Privacy of Individually Identifiable Information, 65 Fed. Reg. 82,462 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160, 164).

57. Giangiulio v. Ingalls Mem'l Hosp., 850 N.E.2d 249, 264 (Ill. App. Ct. 2006).

58. *See* Standards for Privacy of Individually Identifiable Information, 65 Fed. Reg. 82,462 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160, 164) (noting that the Privacy Rule protections "beg[a]n to address growing public concerns that advances in electronic technology . . . result[ed] in a substantial erosion of the privacy [of] individually identifiable health information"); *see also* Coy v. Wash. County Hosp. Dist., 866 N.E.2d 651, 655 (Ill. App. Ct. 2007) (citing to HIPAA and noting that it applies to health plans, health clearinghouses, and health providers and only to those that "transmit 'any health information in electronic form in connection with a transaction' referred to elsewhere in HIPAA"); *Hippocrates*, *supra* note 50, at 510 (noting that through HIPAA, "Congress . . . sought to . . . protect the security, confidentiality, and integrity of medical information challenged by [recent] technological advances"). The *Coy* court also noted that because only the preceding entities are covered by HIPAA, the judiciary is not covered and HIPAA does not prevent a court from unsealing, to facilitate public access, judicial records containing patient medical records. *Coy*, 866 N.E.2d at 655–56.

59. *See* Standards for Privacy of Individually Identifiable Information, 67 Fed. Reg. 53,182 (Aug. 14, 2002) (codified at 45 C.F.R. pts. 160, 164) (explaining the rationale behind the Privacy Rule and providing for certain amendments to the original rule in order to address "the unintended negative effects of the Privacy Rule on health care quality or access to health care").

60. 42 U.S.C. § 1320d–7(a)(1) (2006).

61. 45 C.F.R. § 160.203(b) (2008); *see also Giangiulio*, 850 N.E.2d at 264 (citing to 45 C.F.R. § 160.203(b) (2005)) ("HIPAA contains a preemption provision . . . . However, HIPAA does not

law pertaining to medical record privacy is more restrictive than HIPAA, Illinois privacy laws control insofar as their provisions are more restrictive than HIPAA.[62]

C. Federal Privileges in the Mental Health Context —Jaffee v. Redmond*: The United States Supreme Court Recognizes the Psychotherapist-Patient Privilege*

In 1996, the United States Supreme Court established the federal psychotherapist-patient privilege[63] and even extended this privilege to encompass social workers[64] through its decision in *Jaffee v.*

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preempt state laws that are more stringent.").

62. *Giangiulio*, 850 N.E.2d at 264–65 (citing Moss v. Amira, 826 N.E.2d 1001 (Ill. App. Ct. 2005) (Quinn, J., specially concurring)); *see also Coy*, 866 N.E.2d at 656–57.

> Illinois has a strong and broad public policy in favor of protecting the privacy rights of individuals with respect to their medical information . . . . Individuals have a right to and an expectation of privacy related to their medical information, and this right and expectation of privacy is reflected in our public policy.

Id.

63. Jaffee v. Redmond, 518 U.S. 1, 9–10 (1996). The *Jaffee* Court "relied exclusively on instrumental reasoning to justify the recognition of the privilege." THE NEW WIGMORE, *supra* note 1, at 503. Instrumentalist reasoning posits that "a privilege is an essential instrument or means to the end of promoting certain desirable social consequences. The court creates the privilege to advance the goal of achieving the desired consequences." *Id.* at 111–12. A peripheral issue about the privilege protecting confidentiality of mental health records is the professional obligation of the provider to protect the records of a patient from disclosure. *See* Jana L. Fischer, *What Constitutes an Invalid "Blanket Consent" Within the Purview of Illinois' Mental Health and Developmental Disabilities Confidentiality Act?*, 22 N. ILL. U. L. REV. 535, 539 (2002) [hereinafter *Blanket Consent*] (discussing the connection between the professional obligation to maintain confidentiality and the provisions of the MHDDCA). The ethics standards set forth by various organizations representing mental health providers unanimously "memorialize the tenet that it is a [provider's] primary obligation to protect and respect confidentiality." *Id.*; *see also* AM. PSYCHIATRIC ASS'N, THE PRINCIPLES OF MEDICAL ETHICS 6 (2009), http://www.psych.org/MainMenu/PsychiatricPractice/Ethics/ResourcesStandards/PrinciplesofMedicalEthics.aspx ("[C]onfidentiality is essential to psychiatric treatment . . . . Because of the sensitive and private nature of the information with which the psychiatrist deals, he or she must be circumspect in the information that he or she chooses to disclose to others about a patient."); AM. PSYCHOLOGICAL ASS'N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT R. 4, at 7–8 (2002), http://www.apa.org/ethics/code/code.pdf ("Psychologists have a primary obligation to take reasonable precautions to protect confidential information obtained through or stored in any medium . . . .").

64. *Jaffee*, 518 U.S. at 15. In *Jaffee*, the defendant, a police officer, responded to a violent incident in Hoffman Estates. *Id.* at 4. There was some factual dispute as to what happened upon the officer's arrival at the scene, but the undisputed result was that the defendant, Officer Redmond, shot and killed decedent Allen (on whose behalf the plaintiff Jaffee was bringing suit). *Id.* Jaffee learned through the course of discovery that after shooting decedent Allen, Officer Redmond "had participated in about 50 counseling sessions with . . . a clinical social worker." *Id.* at 5. In an effort to equilibrate witnesses' testimony as to the events in question with Officer Redmond's original report, Jaffee sought specific records from the counseling session limited to only those instances in which Officer Redmond disclosed her memory of the events in question.

Redmond.[65] In so holding, the *Jaffee* Court made a number of important statements in dictum that have resonated with proponents of the psychotherapist-patient privilege.[66] As a result, even though the *Jaffee* decision came down almost twenty years after the MHDDCA's promulgation, its rationale has become influential in Illinois cases because it supports a broad application of the privilege.[67]

First, the *Jaffee* Court noted that in order to be effective, psychotherapy requires a confidential environment that allows the patient to be comfortable in making full disclosure.[68] As a result, this confidential environment must exist because according to the Court, the possibility of losing confidentiality—and the consequent impediment to patient disclosure—limits the benefits of psychotherapy.[69] In addition to this private interest, the Court asserted that the privilege serves the public interest of encouraging persons to seek treatment.[70] As the Court stated, "[t]he mental health of our citizenry, no less than its physical health, is a public good of transcendent importance."[71] In contrast to

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Reply Brief for the Petitioner at 5, *Jaffee*, 518 U.S. 1 (1996) (No. 95–266). The need for these records competed with society's need to ensure that all police were in fact competent to "discharge their sensitive duties." *Id.* at 17 ("'[T]he public should not bear the risk that employees who may suffer from impaired perceptions and judgment' will be permitted to discharge their sensitive duties because of a broad counseling privilege."). "Respondents [, however,] vigorously resisted the discovery." *Jaffee*, 518 U.S. at 5. The district court disagreed with Officer Redmond's contention that there existed a psychotherapist-patient privilege, and the Seventh Circuit Court of Appeals reversed, recognizing the psychotherapist-patient privilege under Rule 501 of the Federal Rules of Evidence. *Id.* at 6–7.

65. *Jaffee*, 518 U.S. at 1.

66. *See, e.g.*, Brief Amicus Curiae of the Mental Health Ass'n in Ill. In Support of Defendants-Appellees at 6–7, Norskog v. Pfiel, 755 N.E.2d 1 (Ill. 2001) (No. 89985) (relying on the *Jaffee* decision and discussing psychological and social rationales for psychotherapist-patient privilege); Brief Amici Curiae in Support of Defendants-Appellees for Bazelon Ctr. for Mental Health Law et al. In Support of Affirmance at 4–6, *Norskog*, 755 N.E.2d 1 (No. 89985) (citing to *Jaffee* for rationales behind the psychotherapist-patient privilege; namely, that the "mere possibility of disclosure" impedes the psychotherapeutic relationship and that only the "certainty" of confidentiality will facilitate proper disclosure during therapy).

67. For examples of cases citing to *Jaffee* in support of prohibiting disclosure under the MHDDCA, see *Norskog*, 755 N.E.2d at 10; Giangiulio v. Ingalls Mem'l Hosp., 850 N.E.2d 249, 262 (Ill. App. Ct. 2006); Chand v. Patla, 795 N.E.2d 403, 409 (Ill. App. Ct. 2003).

68. *Jaffee*, 518 U.S. at 10 (stating that "[e]ffective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure"); *see also Giangiulio*, 850 N.E.2d at 262 (citing to this same *Jaffee* language); *Chand*, 795 N.E.2d at 409 (citing to this same *Jaffee* language).

69. *Jaffee*, 518 U.S. at 10 (stating that "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment"); *see also Giangiulio*, 850 N.E.2d at 262 (citing to this same *Jaffee* language); *Chand*, 795 N.E.2d at 410 (citing to this same *Jaffee* language).

70. *Jaffee*, 518 U.S. at 11.

71. *Id.*; *see also Norskog*, 755 N.E.2d at 10 (citing to *Jaffee* with respect to importance of

the importance of these public and private interests, the Court found that the evidentiary benefit from denial of the privilege would be so low that the aforementioned interests must be considered paramount.[72]

III. DISCUSSION

Due to the complexity of evidentiary privileges and how they impair the judicial system's truth-seeking function,[73] the general history of privileges in all contexts serves as an undercurrent to the psychotherapist-patient privilege in Illinois. Moreover, a discussion of the MHDDCA's legislative history as well as its specific language is necessarily part of determining the propriety of the Illinois courts' interpretations of the MHDDCA. Accordingly, this Part will describe the MHDDCA's legislative history,[74] its current sections and definitions,[75] and the section at issue, section 10(a)(1).[76] This Part will then outline the inconsistent way that Illinois courts have applied section 10(a)(1) by contrasting the Illinois Supreme Court's *Norskog v. Pfiel*[77] and *Goldberg v. Davis*[78] decisions.

A. The Illinois Mental Health and Developmental Disabilities Confidentiality Act

To understand the MHDDCA's nuances, it is necessary to first discuss in detail the provisions enumerated within, and the history behind, the MHDDCA. Consequently, this section will first discuss the promulgation of the MHDDCA, focusing on the statute that preceded it.[79] Next, this section will highlight the primary sections of the MHDDCA and their associated definitions.[80] Lastly, to serve as a precursor to the remainder of this Comment, this section will discuss section 10(a)(1) of the MHDDCA.[81]

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privilege and ubiquitous nature of similar privileges in all 50 states).

72. *Jaffee*, 518 U.S. at 11 (noting that "the likely evidentiary benefit that would result from the denial of the privilege is modest").

73. *See supra* Parts I–II.A (discussing the role of evidentiary privileges in contrast to the court's function as truth seeker).

74. *See infra* Part III.A.1 (describing the MHDDCA's legislative history).

75. *See infra* Part III.A.2 (citing to the MHDDCA's various sections and their corresponding definitions).

76. *See infra* Part III.A.3 (discussing in detail section 10(a)(1) of the MHDDCA).

77. *See infra* Part III.B.1.a (discussing the "at issue" standard as applied to section 10(a)(1)).

78. *See infra* Part III.B.1.b (discussing the "introduction" standard as applied to section 10(a)(1)).

79. *See infra* Part III.A.1 (describing the history behind the MHDDCA).

80. *See infra* Part III.A.2 (citing to and describing the various provisions of the MHDDCA).

81. *See infra* Part III.A.3 (highlighting section 10(a)(1)'s provisions).

1. History of Promulgation[82]

Prior to the MHDDCA, there were various statutes governing the disclosure and confidentiality of mental health records.[83] The direct predecessor to the MHDDCA was the Act of 1872 and its section 5.2, the latter of which was promulgated in 1963.[84] It governed the pre-MHDDCA psychotherapist-patient privilege as it pertained to disclosure of mental health records in judicial or administrative proceedings.[85] Section 5.2 extended the privilege to communications relating to mental health treatment between the provider and the patient, or the patient's family, so long as the communications were made through the course of diagnosis or treatment.[86] The plain language of section 5.2 also expressly excluded from the privilege all communications considered "relevant," presumably as defined by the pleadings or discovery.[87] Accordingly, the plain language of the first psychotherapist-patient privilege acknowledged that the privilege was outweighed where the information sought was relevant to the case.[88]

As part of a comprehensive effort to revise the Illinois Mental Health Code, the MHDDCA was drafted and promulgated, in part, to revise section 5.2, and to compile other statutes that governed the disclosure of mental health records.[89] In addition to this streamlining function, the

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82. Since its promulgation, the Illinois Supreme Court has rendered various amendments to portions of the the MHDDCA unconstitutional. *See, e.g.*, Lebron v. Gottlieb Mem'l Hosp., Nos. 105741, 105745, 2010 WL 375190 (Ill. Feb. 4, 2010) (finding Public Act 94-677, which in part amended section 10, unconstitutional in its entirety); Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1105–06 (Ill. 1997) (holding that Public Act 89-7, which in part amended a portion of section 10, was unconstitutional in its entirety); *see also* Almgren v. Rush-Presbyterian-St. Luke's Med. Ctr., 642 N.E.2d 1264, 1267–68 (Ill. 1994) (finding provision 10(b) of the MHDDCA an unconstitutional infringement on the court's rule-making power "to the extent that [it] . . . attempts to provide for appeals from less than final judgments").

83. *See, e.g.*, Act of 1872 § 5.2 (1963) (codified in part at 740 ILL. COMP. STAT. 110 (2008)) (adding psychotherapist-patient privilege to Illinois' original evidentiary statute); *see also 80th Sess. Deb.*, *supra* note 4, at 63 (noting that the MHDDCA compiled numerous other statutes governing the confidentiality of mental health records and communications).

84. Act of 1872 § 5.2 (1963) (codified in part at 740 ILL. COMP. STAT. 110 (2008)).

85. Section 5.2 applied "[i]n civil or criminal cases, in proceedings preliminary thereto, and in legislative and administrative proceedings." Act of 1872 § 5.2 (1963) (codified in part at 740 ILL. COMP. STAT. 110 (2008)). Section 5.2 was an amendment to "[a]n Act in regard to evidence and depositions in civil cases," which was enacted in 1872 and to which the general physician-patient privilege was added in 1959. *Id.*

86. Act of 1872 § 5.2 (1963) (codified in part at 740 ILL. COMP. STAT. 110 (2008)); *see also infra* notes 275–77 and accompanying text (discussing the Illinois courts' definitions of "relevancy").

87. Act of 1872 § 5.2 (1963) (codified in part at 740 ILL. COMP. STAT. 110 (2008)).

88. *See id.* (implying that disclosure is appropriate where the evidence sought to be admitted is relevant).

89. In 1973, then-Illinois Governor Dan Walker established a Commission for Revision of the

MHDDCA's goal was to ensure the confidentiality of persons entering into therapeutic relationships.[90] Though the MHDDCA is perceived to have created a large obstacle for proponents of disclosure,[91] in reality the specific section at issue in this Comment—current MHDDCA section 10(a)(1)—actually expanded section 5.2. This is so because unlike section 5.2 and the initially proposed confidentiality law,[92] section 10(a)(1) created an exception not only where the mental health condition itself is introduced, but also where an aspect of the services received for that condition is introduced.[93]

Mental Health Code in Illinois. REPORT, GOVERNOR'S COMMISSION FOR THE REVISION OF THE MENTAL HEALTH CODE IN ILLINOIS, at vi (1976) [hereinafter COMMISSION REPORT]. The Commission proposed revisions to the Illinois Code in the following areas: (1) the rights of recipients of mental health services; (2) procedural due process for persons with mental illness or developmental disabilities; (3) guardianship; (4) legal advocacy services; (5) human rights; (6) confidentiality of records; (7) fitness to stand trial; and (8) community mental health. *Id.* at 1. With respect to the confidentiality of mental health records, the enumerated impetus for a revised law was the desire to consolidate existing confidentiality laws and to ensure that the law covered all therapeutic relationships. *Id.* at 5; *see also 80th Sess. Deb.*, *supra* note 4, at 63 (noting that previous statutes governed the varying therapeutic professions using different standards, and "frequently in an inconsistent manner"). The entire psychotherapist community, including psychologists, psychiatrists, and law enforcement, was involved in the drafting of the MHDDCA and the members of this community fully supported the MHDDCA. *Id.* at 63–64. The bill received almost unanimous support in the House, with only one "nay." 2 J. OF THE HOUSE OF REPRESENTATIVES OF THE EIGHTIETH GEN. ASSEMBLY OF THE STATE OF ILL. 2841, 3018 (1978 Sess.). Then-Governor James R. Thompson signed the legislation into law on January 9, 1979. Legislative Reference Bureau – Eightieth Gen. Assemb., *Action on all Bills and Resolutions received through Feb. 13, 1979*, 1 LEGIS. SYNOPSIS & DIG. 1, 51 (1978).

90. *See* COMMISSION REPORT, *supra* note 89, at 5 (describing that because "current Illinois statutes accord a privilege of confidentiality only to certain designated therapeutic professionals . . . [and because] there is no statutory privilege available to protect persons consulting therapists other than those specifically designated . . . the need for consolidation . . . is apparent"); Johnston v. Weil, 920 N.E.2d 494, 500 (Ill. App. Ct. 2009) (citing Quigg v. Walgreen Co., 905 N.E.2d 293, 298 (Ill. App. Ct. 2009)) ("Because [one of] the [MHDDCA's] goals is to ensure the confidentiality of therapeutic relationships, it only includes 'those persons entering into a therapeutic relationship.'").

91. The Illinois Supreme Court has described rendering disclosure under the MHDDCA as "a formidable challenge." Reda v. Advocate Health Care, 765 N.E.2d 1002, 1010 (Ill. 2002); Norskog v. Pfiel, 755 N.E.2d 1, 10 (Ill. 2001). Courts have also used the language that the court "must zealously guard against erosion of the confidentiality privilege." *Norskog*, 755 N.E.2d at 10; People v. Campobello, 810 N.E.2d 307, 314–15 (Ill. App. Ct. 2004). This language is supported by the idea that without such a "formidable challenge," waiver of confidentiality "would result in opening a pandora's box of inquiry into the mental condition of claimants." Thiele v. Ortiz, 520 N.E.2d 881, 888 (Ill. App. Ct. 1988); *see also* Mandziara v. Canulli, 701 N.E.2d 127, 133 (Ill. App. Ct. 1998) ("The General Assembly has made a strong statement about the importance of keeping mental health records confidential.").

92. *See* COMMISSION REPORT, *supra* note 89, at 169 (providing for disclosure only where the recipient's condition is introduced); Act of 1872 § 5.2 (1963) (triggering disclosure only where "the patient [has] introduced his mental condition").

93. Laurent v. Brelji, 392 N.E.2d 929, 932 (Ill. App. Ct. 1979) (finding that in contrast to the previous acts governing the psychotherapist-patient privilege only allowing for a waiver of

2. General Sections and Definitions

Notwithstanding the specifically enumerated exceptions for disclosure, the MHDDCA generally serves to protect the confidentiality of recipients of mental health services.[94] Indeed, such records are entirely privileged unless they fall within one of the exceptions to the MHDDCA[95] or the recipient waives the privilege.[96] It has been recognized, however, that the privileges contained within the MHDDCA are not absolute.[97] In fact, the MHDDCA's enumerated exceptions suggest the legislative intent to recognize that in certain limited circumstances, non-consensual disclosure of covered communications is appropriate.[98]

To fall within the penumbra of the MHDDCA's privilege, the record or communication needs to both "concern"[99] the recipient and be recorded through the provision of mental health services.[100] The record,

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confidentiality when the recipient introduced his or her condition, the modern MHDDCA allows for a waiver of the privilege when the recipient introduced either his or her condition *or* an aspect of the services received on behalf of that condition).

94. ILLINOIS PRACTICE SERIES – MHDDCA § 28.8, *supra* note 3. Under the MHDDCA, a "recipient" is defined to include "any person who is receiving or has received mental health or developmental disabilities services." 740 ILL. COMP. STAT. 110/3(a) (2008).

95. 740 ILL. COMP. STAT. 110/3(a) (2008) ("All records and communications shall be confidential and shall not be disclosed except as provided in this Act"); Giangiulio v. Ingalls Mem'l Hosp., 850 N.E.2d 249, 261 (Ill. App. Ct. 2006) (noting that "the [MHDDCA] is carefully drawn to maintain the confidentiality of mental health records except in the specific circumstances explicitly enumerated.") (citation omitted) (quotation omitted); *Laurent*, 392 N.E.2d at 931 (citing to the MHDDCA and stating that "the [MHDDCA] is premised on a general prohibition against the disclosure of such information except where specifically provided for in the Act"); *see also infra* notes 105–06 and accompanying text (citing to the enumerated exceptions for disclosure under the MHDDCA).

96. *See infra* Part III.B.3 (discussing the application of waivers in Illinois cases interpreting and applying the MHDDCA).

97. *Laurent*, 392 N.E.2d at 932 ("[L]egislative recognition of a testimonial privilege does not afford absolute protection against disclosure."); Doe v. Ill. Dep't of Prof'l Regulation, 793 N.E.2d 119, 125 (Ill. App. Ct. 2003) ("[T]he privilege against disclosure is not absolute.").

98. *Doe*, 793 N.E.2d at 126 ("[I]t is clear that the legislature contemplated the use of mental health records for which no consent has been secured in certain judicial proceedings."); *Laurent*, 392 N.E.2d at 932 ("[T]he legislature acknowledged the countervailing societal needs which demand disclosure in certain instances.").

99. 740 ILL. COMP. STAT. 110/2 (2008) (providing that to be a covered record, the record must "concern[] the recipient and the services provided").

100. *Id.*; *see also* House v. SwedishAmerican Hosp., 564 N.E.2d 922, 928 (Ill. App. Ct. 1990) (finding that the identity of an assailant-patient was discoverable despite an assertion of privilege under the MHDDCA because, at the time of the attack, the patient was not in the hospital for psychiatric services, but rather for "regular" medical care). As defined by the MHDDCA, covered "services include, but are not limited to, examination, diagnosis, evaluation, treatment, training, pharmaceuticals, aftercare, habilitation or rehabilitation." 740 ILL. COMP. STAT. 110/2 (2008); *see also* Quigg v. Walgreen Co., 905 N.E.2d 293, 299 (Ill. App. Ct. 2009) (holding that because Walgreen's was not engaging in a therapeutic relationship by "act[ing] purely as a

however, does not include the provider's personal notes regarding the patient and as the work product of the provider, they are not subject to discovery irrespective of whether the patient's other records are discoverable.[101] The MHDDCA also extends privilege protection to communications made by a recipient both to a mental health provider and in the presence of other persons so long as the communication was made "during or in connection to" the provision of mental health services.[102] The MHDDCA further renders confidential the pure fact that an individual is a recipient of such services.[103] Lastly, unless otherwise provided for, solely the recipient holds the privilege and can consent to disclosure.[104] The privilege, however, can generally be waived in three ways: (1) by the recipient's consent to disclosure;[105] (2)

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pharmacist," it was not subject to liability under the MHDDCA); Suarez v. Pierard, 663 N.E.2d 1039, 1042 (Ill. App. Ct. 1996) (finding that "the concept of a therapeutic relationship is [not] so expansive that it includes a routine transaction with a pharmacist"). Compare *People v. Gemeny*, where the court held that "communications during services" encompassed communications made between a court ordered therapist and criminal defendant whereby the defendant left threatening messages on the therapist's answering machines. People v. Gemeny, 731 N.E.2d 844, 852 (Ill. App. Ct. 2000); *see also In re* Marriage of Semmler, 413 N.E.2d 502, 506 (Ill. App. Ct. 1980) (holding that "[w]here a person makes statements to a therapist in a professional consultation, those statements are privileged").

101. 740 ILL. COMP. STAT. 110/2 (2008). The providers note exclusion encompasses three categories:

> (1) information disclosed to the therapist in confidence by other persons on condition that such information would never be disclosed to the recipient or other persons; (2) information disclosed to the therapist by the recipient which would be injurious to the recipient's relationships to other persons; or (3) the therapist's speculations, impressions, hunches and reminders.

Id.; *see also In re* Estate of Bagus, 691 N.E.2d 401, 405 (Ill. App. Ct. 1998) ("[A]ny documents that the trial court determines are personal notes shall not be disclosed to the estate or its attorneys."). If, however, such records are disclosed to another person, they become a part of the recipient's "record" and once it becomes part of the recipient's discoverable record, it is no longer considered the "personal note" of the provider. 740 ILL. COMP. STAT. 110/2 (2008).

102. 740 ILL. COMP. STAT. 110/2 (2008); *cf. Gemeny*, 731 N.E.2d at 849 ("Nothing in the definition of 'communication' limits that term to statements made during an actual treatment session . . . the legislature showed its willingness to protect statements made outside the formal treatment process itself . . . . The professional relationship cannot be neatly confined to what happens in formal treatment sessions . . . .").

103. 740 ILL. COMP. STAT. 110/2 (2008). The MHDDCA does, however, provide that certain parties are entitled to inspect and copy a recipient's mental health records including parents or guardians of patients under the age of twelve or over eighteen, recipients over the age of twelve, or powers of attorney for healthcare or property. *Id.* § 110/4(a)(1)–(6).

104. *Id.* § 110/10(a); Novak v. Rathnam, 478 N.E.2d 1334, 1337 (Ill. 1985); Chi. Hous. Auth. v. Human Rights Comm'n, 759 N.E.2d 37, 51 (Ill. App. Ct. 2001).

105. The MHDDCA provides for various ways by which a recipient can consent to disclosure of his or her records subject to the limitations imposed by the MHDDCA. *See* 740 ILL. COMP. STAT. 110/5 (2008) (enumerating applicability of consent and specific requirements of valid consent). Though the MHDDCA expressly indicates that blanket consents to disclosure are invalid, *id.* § 110/5(7), scholars have questioned the extent to which that provision protects

application of an enumerated exception;[106] or (3) the recipient's failure to object during trial when the opposing party offers material covered by the MHDDCA.[107]

3. Section 10(a)(1) – Disclosure in Civil, Criminal, Administrative, and Legislative Proceedings

Section 10(a)(1) of the MHDDCA provides an exception for the disclosure of records during the course of civil, criminal, or "other proceedings,"[108] and is a highly litigated provision of the MHDDCA.[109]

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recipients from non-consensual disclosure of records. *See, e.g.*, *Blanket Consent*, *supra* note 63, at 543–56 (discussing insufficiency of the 'blanket consent' provision and criticizing signed authorization forms that serve as "prima facie evidence of valid consent"). The MHDDCA additionally provides for a few exceptions by which records can lawfully be disclosed without consent of the recipient. 740 ILL. COMP. STAT. 110/6–9.3 (2008). These provisions provide for the non–consensual disclosure of records in an application for benefits where the recipient is not able to consent "despite every reasonable effort . . . to obtain consent," *id.* § 110/6, during agency review "for purposes of licensure, statistical compilation, research, evaluation, or other similar purposes," *id.* § 110/7, interagency disclosures between agencies of the state, *id.* §§ 110/7.1, 9.1–9.2, records of the developmentally disabled residing in facilities where notice has been given to the recipient, *id.* § 110/8.1, between providers in a professional capacity, *id.* § 110/9, of persons receiving treatment under the Sexually Violent Persons Commitment Act, *id.* § 110/9.3, and for various other rationale including to warn specific individuals or the initiation or continuation of civil commitment proceedings. *See, e.g.*, *id.* § 110/11(i)–(xii) (providing additional avenues for non–consensual disclosure).

106. Along with the exceptions enumerated in section 10(a)(1), the MHDDCA provides exceptions to disclosure in civil and criminal proceedings including, but not limited to, claims against the provider for injuries incurred by the recipient during the course of providing such services, *id.* § 110/10(a)(3), records or communications made to a provider in the course of a good faith court-ordered examination provided the recipient has been adequately informed of the lack of confidentiality or privilege, *id.* § 110/10(a)(4), and proceedings to determine fitness to stand trial or competency for guardianship, *id.* § 110/10(a)(5).

107. People v. Leggans, 625 N.E.2d 1133, 1139 (Ill. App. Ct. 1993) (noting that because the defendant-recipient had not properly objected to the introduction of his mental health records at trial, he waived the issue on appeal, as well as the privilege). The MHDDCA enumerates other provisions that provide for the miscellaneous disclosure of records as they pertain to investigations by the United States Secret Service and the Department of State Police. 740 ILL. COMP. STAT. 110/12 (2008). Lastly, there is a provision creating a statutory cause of action for damages, an injunction, "or other appropriate relief" to a party aggrieved by a violation of the MHDDCA. *Id.* § 110/15.

108. 740 ILL. COMP. STAT. 110/10(a) (2008).

109. *See infra* notes 142–43 (citing cases specifically dealing with section 10(a)(1)). Section 10 of the MHDDCA also provides procedural rules governing admission and exceptions for admissibility in several other miscellaneous proceedings. 740 ILL. COMP. STAT. 110/10(b)–(f) (2008). In the Ninety-Sixth General Assembly, the Illinois Legislature amended section 10(f) by enacting Public Act 96-406. H.B. 3843, 2009 Leg., 96th Sess. (Ill. 2009). The amendment allows for investigations made by the Department of Human Services Act (instead of the Abused and Neglected Long Term Care Facility Residents Reporting Act), permits disclosure pursuant to The Department of Human Services Act when the records are relevant to issues in health care worker registry hearings, and precludes disclosure or re-disclosure except in connection with the above action. *Id.*

Commonly known as the patient-litigant exception,[110] this provision has a broad scope and encompasses practically all civil, criminal, administrative, or legislative proceedings.[111] Courts have recognized that the purpose of section 10(a)(1) is to facilitate a "sophisticated balancing test" wherein the court weighs the evidentiary value of mental health records against the recipient's privacy interests and the interests of substantial justice.[112] Under section 10(a)(1), unless disclosure falls within one of its eleven enumerated exceptions,[113] the recipient has the privilege to refuse to disclose his or her records.[114]

Under section 10(a)(1), three underlying issues determine the admissibility of mental health records. First, the court must assess whether the recipient's mental health condition or an aspect of the services received has been introduced as an element of his or her claim or defense.[115] Second, the court determines whether the records are relevant, probative, not unduly prejudicial or inflammatory, and otherwise clearly admissible.[116] Finally, the court weighs disclosure against the potential injury to the psychotherapist-patient relationship.[117]

Section 10(a)(1) further provides that, except in criminal proceedings in which a recipient raises an insanity defense, communications between therapist and recipient are not relevant except for records concerning the fact of treatment, cost of services, and ultimate diagnosis

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110. *See* COMMISSION REPORT, *supra* note 89, at 170 ("[The proposed section 10(a)] is the so-called patient litigant exception which has been embodied in statutes as a routine matter in most jurisdictions.").

111. *Id.*; *see also* Goldberg v. Davis, 602 N.E.2d 812, 817 (Ill. 1992) (noting that section 10 of the MHDDCA is the provision relied upon for disclosure without consent in administrative or judicial proceedings).

112. Mandziara v. Canulli, 701 N.E.2d 127, 133 (Ill. App. Ct. 1998).

113. 740 ILL. COMP. STAT. 110/10(a) (2008). It has also been held that section 10 encompasses the exceptions set forth in section 7(a). *See* Doe v. Ill. Dep't of Prof'l Regulation, 793 N.E.2d 119, 126 (Ill. App. Ct. 2003) (holding that because statutes must be read as a whole, the "except as provided herein" language of section 10(a) encompassed all of the exceptions within the entirety of the MHDDCA, not just the eleven specifically referred to under section 10).

114. 740 ILL. COMP. STAT. 110/10(a) (2008). The provider or therapist, on behalf of, or if in the interests of the patient, may also in limited circumstances consent to disclosure. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* § 110/10(a)(1) (mandating that the court must find that "other satisfactory evidence is demonstrably unsatisfactory . . . and that disclosure is more important to the interests of substantial justice than protection from injury to the therapist-recipient relationship or to the recipient or other whom disclosure is likely to harm"). The Illinois Supreme Court has additionally created an alternative exception for admission, that of "fundamental fairness." *See infra* notes 120–32 and accompanying text (analyzing the *D.C. v. S.A.* decision); *see also infra* Parts III.B.2, IV.B, and V.C (discussing the second and third prongs of section 10(a)(1)).

unless the proponent of disclosure establishes a "compelling" need for production.[118] Finally, section 10(a)(1) expressly provides that a claim for pain and suffering does not per se introduce one's mental condition.[119]

In 1997, the Illinois Supreme Court created an alternative basis for admission under section 10(a)(1) through its decision in *D.C. v. S.A.*: the "fundamental fairness" exception.[120] In *D.C. v. S.A.*, plaintiff D.C. brought suit against defendant S.A. for injuries arising out of an automobile accident in which D.C., a pedestrian, was hit by S.A.'s car.[121] D.C. did not allege any psychological injuries, but did assert that he was "in the exercise of due care."[122] S.A.'s strategy was to establish D.C.'s comparative negligence because S.A. had obtained evidence that D.C. may have been attempting suicide at the time of the accident.[123] D.C.'s contributory negligence would have absolved S.A. of any liability for the injuries.[124] Although the court found that D.C. did not

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118. 740 ILL. COMP. STAT. 110/10(a)(1) (2008).

119. *Id.* Under this provision, a claim for pain and suffering constitutes an introduction of the recipient's mental condition only if either the recipient or a witness on behalf of the recipient presents testimony pertaining to privileged communications. *Id.*

120. D.C. v. S.A., 687 N.E.2d 1032, 1040–41 (Ill. 1997). "Fundamental fairness" is a judicial doctrine that has been applied in many other contexts. *See, e.g.*, People v. Carter, 905 N.E.2d 874, 881 (Ill. App. Ct. 2009) ("[F]undamental fairness includes, among other things, seeing to it that certain basic instructions, essential to a fair determination of the case by the jury, are given.") (citation omitted); People v. Breedlove, 795 N.E.2d 862, 864 (Ill. App. Ct. 2003) ("'Fundamental fairness' is a specific exception to the waiver doctrine, which warrants judicial review of procedurally defaulted claims only if actual prejudice has resulted from the claimed errors."); City of Quincy v. Diamond Constr. Co., 762 N.E.2d 710, 713 (Ill. App. Ct. 2002) (noting the trial court's decision that "fundamental fairness dictated the highest and best use of Diamond's property").

121. *D.C.*, 687 N.E.2d at 1034.

122. *Id.* After the trial court found that plaintiff had indeed placed his mental condition at issue by asserting his due care, the court ordered disclosure of certain medical records of plaintiff's post-accident psychiatric care. *Id.* at 1035. Prior to its decision, the trial court conducted an *in camera* review of the records and determined that (1) plaintiff had waived his privilege when he claimed to be in the exercise of due care; (2) the records were relevant and probative; (3) while prejudicial, the records were not unduly prejudicial; and (4) the limited records were admissible because disclosure in the interest of substantial justice outweighed protection of the privilege. *Id.* The appellate court reversed by holding that "a plaintiff does not waive the privilege . . . unless he specifically or affirmatively raises the condition as an element of his claim." *Id.* at 1036. The appellate court went on to conclude that the per se filing of a negligence claim "does not require a plaintiff to specifically or affirmatively plead his mental condition." *Id.* (quotations omitted).

123. It is unclear from the decision exactly how the defendant came to possess this letter, but the decision indicates that it was originally written by D.C.'s physician to D.C.'s attorney. *Id.* at 1035.

124. *Id.* at 1041. The *D.C.* court highlights an interesting peripheral issue. S.A. asserted that D.C. bore the burden of proving that his negligence was the sole, proximate cause of his injuries and thus, D.C. per se placed his mental condition at issue as his condition directly implicated

place his mental condition "at issue,"[125] it nonetheless held that the "fundamental fairness" doctrine required admission of the evidence because the information would be dispositive to the issue of S.A.'s liability.[126]

Through its opinion, the court made a few crucial findings that, at the time, had the potential to affect future claims under section 10(a)(1).[127] First, the court found that fundamental fairness and substantial justice outweigh the privilege when the party seeks to use confidentiality as a "sword" rather than a protective measure.[128] Second, the court ruled that disclosure of a "small amount of information" that pertains to motivation or conduct may be admissible if it does not divulge diagnoses, treatment, or progress.[129] Finally, the court held that even if the recipient does not introduce his or her condition as required by section 10(a)(1), fundamental fairness could nonetheless authorize admission.[130] While the court expressly emphasized that its decision was narrow,[131] the fundamental fairness doctrine sent waves of fear through the advocacy community that an expansion of section 10(a)(1) might lead to the unwarranted disclosure of sensitive mental health records.[132]

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defendant's potential liability. *Id.* at 1038. As the Illinois Supreme Court held, however, "with . . . comparative negligence, both logic and fairness dictate[] that the defendant, who stood to benefit from a showing [of plaintiff's negligence] . . . [has] the burden of proof on the issue." *Id.* The court went on to note that contributory negligence was codified as an affirmative defense by 735 ILL. COMP. STAT. 5/2-613(d) (1994). *Id.* at 1039.

125. The court held that neither the "boilerplate" language in D.C.'s complaint nor D.C.'s denial of any contributory negligence effectively placed his mental condition at issue. *D.C.*, 687 N.E.2d at 1039.

126. *Id.* at 1040–41. The court additionally reviewed the third prong of the 10(a)(1) test and established that the records sought were relevant, probative, admissible, not unduly prejudicial, and not obtainable elsewhere. *Id.* at 1041.

127. The fundamental fairness exception created by *D.C.* was controversial and had the potential to affect future cases, but it has not been followed in subsequent decisions. *See infra* note 131 and accompanying text (discussing cases that have cited to, but declined to follow, the fundamental fairness exception).

128. *D.C.*, 687 N.E.2d at 1041.

129. *Id.*

130. *Id.* at 1040.

131. *Id.* at 1041. In part as a result of its narrowness, *D.C.* has been discussed in few cases and those that discuss it do not follow its rationale. *See, e.g.*, Reda v. Advocate Health Care, 765 N.E.2d 1002, 1011 (Ill. 2002) (refusing to follow *D.C.* because plaintiffs were not invoking the privilege to "exploit or subvert the legal process"); People v. Gemeny, 731 N.E.2d 844, 852 (Ill. App. Ct. 2000) ("[F]undamental fairness . . . does not require that defendant surrender his statutory privilege" where defendant does not use the statute "as a sword.").

132. *See, e.g.*, Brief Amicus Curiae of the Mental Health Ass'n in Ill. in Support of Defendants-Appellees at 1, 7–9, Norskog v. Pfiel, 755 N.E.2d 1 (Ill. 2001) (No. 89985) (arguing that *D.C.* "significantly undermines the intent and efficacy of [the MHDDCA]" and as a result,

B. Section 10(a)(1) and the Illinois Courts: A Strained Relationship

Due to the complex balancing process required to interpret and apply the MHDDCA, the Illinois courts have engaged in a variety of interpretive methods when deciding what behavior triggers the section 10(a)(1) exception, and to what extent section 10(a)(1) restricts disclosure.[133] Illinois courts have come to utilize two primary standards of admissibility for the first prong of 10(a)(1): "at issue" or "introduction," and in some cases what appears to be a combination of the two.[134] Delineating these two methods and illustrating their applications is imperative to understanding the proper statutory construct. Accordingly, this section will first discuss the Illinois courts' application of section 10(a)(1) through the "at issue" standard.[135] This section will then discuss the Illinois courts' utilization of the "introduction" standard, the standard that maintains congruency with the statute's plain language.[136] Lastly, this section will outline the second and third prongs of section 10(a)(1) and the Illinois courts' utilization of these prongs in determining mental health record admissibility.[137]

1. Prong One: Recipient's Introduction of Mental Health Condition

The "initial hurdle"[138] to disclosure under section 10(a)(1) requires the recipient to satisfy the first prong: introduction of his or her condition "or any aspect of his [or her] services received for such condition as an element of his [or her] claim or defense."[139] The courts have largely applied these terms—for example, "introduction"—by

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"subjects every (tort) plaintiff to discovery requests concerning mental health treatment" and should be reconsidered); Brief Amici Curiae in Support of Defendants-Appellees for Bazelon Ctr. for Mental Health Law et al. In Support of Affirmance at 19–20, *Norskog*, 755 N.E.2d 1 (No. 89985) (similarly requesting that the Illinois Supreme Court overturn *D.C.*, noting that the decision created a "crack in the certainty of the privilege" which future cases will "attempt[] to widen").

133. *See infra* Part III.B.1 (describing the "at issue" and "introduction" standards used by Illinois courts).

134. *See infra* Part III.B.1 (describing the "at issue" and "introduction" standards used by Illinois courts).

135. *See infra* Part III.B.1.a (discussing cases applying an "at issue" standard of admissibility).

136. *See infra* Part III.B.1.b (discussing cases applying an "introduction" standard of admissibility).

137. *See infra* Parts III.B.2–3 (discussing prongs two and three and the application of waivers under section 10(a)(1)).

138. Norskog v. Pfiel, 755 N.E.2d 1, 14 (Ill. 2001).

139. 740 ILL. COMP. STAT. 110/10(a)(1) (2008).

analyzing the perceived legislative intent for the MHDDCA.[140] Moreover, despite the statute's plain language, the courts have tended to primarily assess the admissibility of records under an "at issue" standard rather than the "introduction" standard set forth in the statute.[141]

This section will discuss the overwhelming majority of decisions that have determined the propriety of admission apparently based on the "at issue" standard.[142] Though a few cases have utilized the "introduction" standard set forth in the statute,[143] the inconsistency between the

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140. The Illinois Supreme Court has recognized that where statutory language is "susceptible of more than one interpretation, the court may look beyond the language to consider the purposes of the statute." Reda v. Advocate Health Care, 765 N.E.2d 1002, 1007 (Ill. 2002). Accordingly, the Illinois courts have interpreted the plain language of the statute based on the perceived intent of the legislature. *See, e.g.*, *Norskog*, 755 N.E.2d at 9–10 ("[T]he legislature has been careful to restrict disclosure to that which is necessary to accomplish a particular purpose . . . . When viewed as a whole, the [MHDDCA] constitutes a 'strong statement' by the General Assembly about the importance of keeping mental health records confidential."); Chi. Hous. Auth. v. Human Rights Comm'n, 759 N.E.2d 37, 51 (Ill. App. Ct. 2001) ("[T]he [MHDDCA] was intended to maintain the confidentiality of mental health records except in specific circumstances, which have become narrowly drawn."); Mandziara v. Canulli, 701 N.E.2d 127, 133 (Ill. App. Ct. 1998) ("[T]he General Assembly has made a strong statement about the importance of keeping mental health records confidential. If we were to hold Cannulli did not violate the [MHDDCA] . . . we would be rewriting the statute, effectively eroding unmistakable legislative intent."); House v. SwedishAmerican Hosp., 564 N.E.2d 922, 926 (Ill. App. Ct. 1990) ("This general prohibition against disclosure of [mental health] information was enacted to protect the patient's privacy rights, along with providing an inducement to seek such treatment.").

141. *See* discussion *infra* Parts III.B.1, IV.A.3.

142. *See Norskog*, 755 N.E.2d at 12 (finding that though defendant introduced an insanity defense prior to pleading guilty, "[b]y pleading guilty . . . the question of sanity was no longer an issue" and thus, records pertaining to treatment could not be discovered in a subsequent action); *Chi. Hous. Auth.*, 759 N.E.2d at 51 (stating that recipient "did not place his mental health at issue . . . simply by alleging a charge of discrimination based on [mental illness] in his original complaint . . . . [Recipient] could have waived it if he had affirmatively placed his mental health at issue"); People v. Gemeny, 731 N.E.2d 844, 851 (Ill. App. Ct. 2000) ("The state's argument is refuted by case law establishing that [the section 10(a)(1)] exemption applies only when a party affirmatively places his own mental condition in issue."); Sassali v. Rockford Mem'l Hosp., 693 N.E.2d 1287, 1289 (Ill. App. Ct. 1998) ("A recipient waives the confidentiality . . . only if she affirmatively places her own mental condition at issue."); *In re* Marriage of Bonneau, 691 N.E.2d 123, 130 (Ill. App. Ct. 1998) (asserting that privilege is waived only where recipient "specifically or affirmatively place[s] his or her mental or physical health in issue in the pleadings"); Maxwell v. Hobart Corp., 576 N.E.2d 268, 271 (Ill. App. Ct. 1991) (finding that if the MHDDCA applied to records for alcoholism treatment, the plaintiff would have "placed his physiological and biological condition at the time of the accident into issue and made discoverable all information relating to that condition"); Thiele v. Ortiz, 520 N.E.2d 881, 888 (Ill. App. Ct. 1988) ("[A] claim . . . under the Wrongful Death Act does not place the decedent's mental condition at issue."); Bland v. Dep't of Children & Family Servs., 490 N.E.2d 1327, 1333 (Ill. App. Ct. 1986) (holding that the privilege "can be waived either expressly or by affirmatively placing in issue one's mental condition . . . . Unless mental well-being is specifically made an issue by the pleadings, the privilege pertains").

143. *See* D.C. v. S.A., 687 N.E.2d 1032, 1039 (Ill. 1997) (holding that "plaintiff's denial of

decisions underscores the need for an affirmative declaration of the statutory interpretation.[144] To explore the distinction between these two standards and their effects, this section will compare the Illinois Supreme Court's decisions in *Norskog v. Pfiel*[145] and *Goldberg v. Davis*.[146]

a. Placing an Element "At Issue" Under Section 10(a)(1)

Though the requirement that the recipient must introduce his or her mental condition is seemingly simple, many Illinois courts have struggled to define when and by whom a recipient's condition is introduced for purposes of disclosure under the MHDDCA.[147] In so doing, the courts have expansively construed "introduction" to mean "at issue," and although this Comment asserts that "at issue" is an improper standard by which to adjudge admission of records under the MHDDCA, the courts' prevalent application of this standard mandates a discussion of its elements and effect.[148] This sub-section will highlight the Illinois cases that have applied the "at issue" standard for 10(a)(1) admissibility.

Prior to the promulgation of the MHDDCA, cases supported the rule that disclosure was only proper where a recipient "affirmatively" put his or her condition "at issue."[149] This language was consistent with the

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any contributory negligence . . . does not by itself . . . result in the introduction by plaintiff of his mental condition"); Goldberg v. Davis, 602 N.E.2d 812, 817 (Ill. 1992) (finding that "[the recipient] ha[d] introduced her mental condition as well as services received"); *In re* Estate of Bagus, 691 N.E.2d 401, 404 (Ill. App. Ct. 1998) (citing to section 10(a)(1) and stating that the "privilege is waived if the recipient introduces his mental condition," though eventually deciding the propriety of disclosure based on 10(a)(2)); Laurent v. Brelji, 392 N.E.2d 929, 932 (Ill. App. Ct. 1979) (finding that patient "introduced an aspect of the services he received for his mental condition" through testimony at an administrative disciplinary proceeding against his former physician).

144. *See infra* Parts IV.A.3, V (discussing the effect of the Illinois courts' variable interpretations of the 10(a)(1) test and proposing a solution to the variable interpretation of admissibility under 10(a)(1)); *see also infra* note 157 and accompanying text (discussing examples of cases that appear to utilize a hybrid test that applies both the "at issue" and "introduction" standards).

145. *Norskog*, 755 N.E.2d at 1.

146. *Goldberg*, 602 N.E.2d at 812.

147. *See supra* note 142 (listing cases that discuss the application of section 10(a)(1) using the "at issue" standard).

148. *See also infra* Part V (proposing incremental reform to the courts' interpretations and application of this provision).

149. *See, e.g.*, Tylitzki v. Triple X Serv., Inc., 261 N.E.2d 533, 536 (Ill. App. Ct. 1970) (holding that the controlling issue in determining "at issue" is whether the recipient affirmatively placed his or her condition at issue.); Webb v. Quincy City Lines, Inc., 219 N.E.2d 165, 167 (Ill. App. Ct. 1966) ("[T]he privilege exists unless 'mental condition' is specifically made a part of either the claim or defense.").

plain language of the physician-patient privilege that preceded both the predecessor to the MHDDCA (section 5.2) and the current MHDDCA.[150] This standard, however, has continued under the modern confidentiality privilege despite the MHDDCA's plain language requiring a mere introduction of the recipient's condition rather than a placement of that condition directly "at issue."[151]

Under the "at issue" standard, the recipient may place his or her condition at issue by "affirmatively" asserting an aspect of that condition in any part of his or her claim or defense.[152] In this respect, case law has generally complied with pre-MHDDCA interpretations of "affirmative"[153] to mean "specific," with courts holding that unless the recipient specifically alleges an aspect of his or her condition or a claim for mental suffering, the "affirmative" requirement is not met.[154] Moreover, a mere allegation for pain and suffering cannot per se place one's mental condition "at issue,"[155] and a recipient's peripheral assertion of general facts pertaining to his or her mental health does not place that condition "at issue."[156] Many of these decisions have also

150. *See supra* notes 48–49 and accompanying text (discussing the "at issue" standard under general physician-patient privilege).

151. *See supra* notes 115–17 and accompanying text (explaining the three-pronged test for determining admissibility under 10(a)(1)); *see also, e.g.*, Thiele v. Ortiz, 520 N.E.2d 881, 888 (Ill. App. Ct. 1988) (citing pre-MHDDCA cases *Tylitzki* and *Webb* for the proposition that "unless mental well-being is specifically made an issue by the pleadings, the privilege of confidentiality is applicable").

152. *See, e.g.*, Sassali v. Rockford Mem'l Hosp., 693 N.E.2d 1287, 1289 (Ill. App. Ct. 1998) ("A recipient waives the confidentiality . . . only if she affirmatively places her own mental condition at issue."); *In re* Marriage of Bonneau, 691 N.E.2d 123, 130 (Ill. App. Ct. 1998) (asserting that the privilege is waived only where a recipient "specifically or affirmatively place[s] his or her mental or physical health in issue in the pleadings"); Bland v. Dep't of Children & Family Servs., 490 N.E.2d 1327, 1333 (Ill. App. Ct. 1986) ("[T]he privilege can be waived either expressly or by affirmatively placing in issue one's mental condition . . . . Unless mental well-being is specifically made an issue by the pleadings, the privilege pertains . . . .").

153. *See, e.g.*, *Tylitzki*, 261 N.E.2d at 537 ("[T]he privilege can be waived . . . by affirmatively placing in issue one's physical or mental condition.").

154. *See, e.g.*, Reda v. Advocate Health Care, 765 N.E.2d 1002, 1009–10 (Ill. 2002) (relying on *Tylitzki* and *Webb* for the application of "affirmative"); Bland v. Dep't of Children & Family Servs., 490 N.E.2d 1327, 1333 (Ill. App. Ct. 1986) (using same language as *Tylitzki* that "[u]nless mental well-being is specifically made an issue by the pleadings, the privilege pertains").

155. 740 ILL. COMP. STAT. 110/10(a)(1) (2008) (expressly stating that a recipient's "mental condition shall not be deemed to be introduced merely by making [a] claim [for pain and suffering]").

156. Under the "at issue" standard, an assertion of neurological injury does not suffice to render records of one's mental health condition admissible even if the plaintiff-recipient affirmatively introduces an aspect of his or her mental health services in conjunction with damages. *Reda*, 765 N.E.2d at 1005. In *Reda*, the court held that an allegation of neurological injury did not constitute the placement of one's mental health condition at issue. *Id.* at 1009. The plaintiff in *Reda*, however, had expressly mentioned his psychiatrist in deposition, stating in

incorporated a hybrid interpretation for determining admissibility, wherein the court briefly acknowledges the "introduction" plain language of the statute, but then ultimately utilizes the "at issue" standard's "specific" or "affirmative" language to support admissibility.[157]

Courts may further rely on the language of the pleadings or discovery documents to determine whether the recipient has asserted any issue pertaining to his or her mental health condition.[158] Yet, where a recipient initially alleges an aspect of his or her condition and then retracts such an allegation by the time the proceedings commence, the "at issue" standard has not been met.[159] In this respect, an amended complaint supersedes an initial allegation of discrimination based on mental illness, and thus the superseded complaint cannot place a recipient's condition "at issue."[160] This issue of superseding proceedings was the crux of the Illinois Supreme Court's *Norskog v.*

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response to a question about whether his headaches had gone away, that "them [sic] headaches have not gone away. I had Dr.—the shrink, I kept accusing him . . . ." *Id.* at 1005. Although the plaintiff-recipient in *Reda* did not put his mental health *affirmatively at issue* per se, it could be argued that he introduced his mental health as it pertained to both liability and damages by indicating that a portion of his damages may have been the result of his psychiatric medications rather than defendant's negligence.

157. All such cases wherein the court appears to utilize a hybrid interpretation are discussed within the "at issue" context because of their ultimate analysis with the more strenuous "at issue" standards. See, e.g., *Reda v. Advocate Health Care*, where though the court ultimately concluded that disclosure was not warranted because the recipient did not "introduce" his condition, it did so by using language that comports with the "at issue" standards. *Reda*, 765 N.E.2d at 1009 (holding that the "[recipient] did not place his mental condition at issue merely by claiming damages for what is a neurological injury"). The same can be said of *Mandziara v. Canulli*, 701 N.E.2d 127, 133 (Ill. App. Ct. 1998), where the court applied the same hybrid language as that seen in *Reda*, and *People v. Gemeny*, 731 N.E.2d 844, 851 (Ill. App. Ct. 2000), where the court cites to the plain language of section 10(a)(1) and then applies the "at issue" standards enumerated in *Mandziara* and *Sassali*. *See also* Chi. Hous. Auth. v. Human Rights Comm'n, 759 N.E.2d 37, 50–51 (Ill. App. Ct. 2001) (finding first that the recipient had to introduce his condition, and then finding that the recipient had not done so utilizing the "at issue" standard); *Bland*, 490 N.E.2d at 1333 (noting statutory requirement that the patient introduce his or her condition, then proceeding to an analysis that only an express or affirmative placement of the condition "at issue" suffices to waive the privilege).

158. *Reda*, 765 N.E.2d at 1010 (finding that, because the MHDDCA does not limit disclosure to that which is contained within the pleadings, "a party may introduce his or her mental condition in several ways . . . , *e.g.*, in the pleadings, answers to written discovery, a deposition, in briefs or motions, in argument before the court, or by stipulation").

159. *See Chi. Hous. Auth.*, 759 N.E.2d at 50–51. In *Chicago Housing*, the original complaining party Lasko brought a complaint against his employer, the Chicago Housing Authority, alleging discrimination. *Id.* at 40. The charge originally included an allegation of discrimination on the basis of Lasko's mental illness, but prior to its adjudication he voluntarily dismissed that particular allegation. *Id.* at 42, 51.

160. *Id.* at 51.

Pfiel decision,[161] and underscores the practical implications of utilizing the "at issue" standard.

In *Norskog*, the defendants in a wrongful death suit, Roger and Gayle Pfiel and their son Steven [hereinafter "Pfiels"], refused to disclose information regarding Steven's mental health diagnosis and treatment.[162] The procedural history of the case illustrates the complex legal issue before the court.[163] In 1993, Steven, then seventeen, stabbed Hilary Norskog to death and was charged with her murder.[164] After pleading not guilty and notifying the parties that he would assert an insanity defense, the court released Steven on bond.[165] While on bond, Steven murdered his brother and assaulted his sister.[166] Upon his subsequent arrest, Steven pled guilty to Hilary's murder and entered into a plea agreement for life imprisonment.[167]

In subsequent civil proceedings, Hilary's mother, on behalf of herself and Hilary's estate [hereinafter "Norskogs"], brought various claims against the Pfiels including claims for negligent supervision and entrustment based on their failure to properly supervise and control Steven.[168] Both claims required that the Norskogs prove that Steven's parents knew of Steven's mental instability and to some extent, his

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161. *See* Norskog v. Pfiel, 755 N.E.2d 1, 11–12 (Ill. 2001) (finding that mental health was not "at issue" in a prior proceeding where recipient had initially raised an insanity defense to criminal charges, but later pled guilty).

162. *Id.* at 4.

163. The procedural posture of this case is also interesting as a result of the fact that the matter before the Illinois Supreme Court was an evidentiary order: orders which are generally considered non-final and thus not immediately appealable. *Id.* at 8; *see also* People v. Campobello, 810 N.E.2d 307, 313 (Ill. App. Ct. 2004) (holding that "[g]enerally, nonfinal discovery orders are not appealable") (citation omitted). Nonetheless, non-final discovery orders are appealable where the appellants contest the correctness of a contempt sanction for noncompliance with the non-final discovery order. *Id.* (citation omitted). Unlike the review of other discovery orders, which normally grants immense discretion to the trial court by utilizing the abuse of discretion standard, a review of the applicability of evidentiary privileges requires the court of review to use the de novo standard. *Id.* (citing Berry v. W. Suburban Hosp. Med. Ctr., 788 N.E.2d 75, 78 (Ill. App. Ct. 2003)).

164. *Norskog*, 755 N.E.2d at 5.

165. *Id.* It should be noted that the court additionally appointed a psychiatrist "to examine Steven to determine his fitness to stand trial." *Id.* The court eventually found, however, that because the psychiatrist had not specifically mentioned that disclosure may occur in subsequent civil proceedings and because the code of civil procedure provided for fitness examination disclosure only where the recipient raised the defense of insanity, "it is reasonable to conclude that by participating in the court-ordered fitness examinations, Steven agreed to waive his confidentiality privilege only to the extent provided by the strict procedural rules contained in the Criminal Code." *Id.* at 13.

166. *Id.* at 5.

167. *Id.*

168. *Id.*

propensity for violence.[169] To establish this knowledge, the Norskogs sought records from the court-ordered psychiatrist, Steven's school records, and mental health treatment records limited to dates and the purpose of treatment, any diagnoses, and whether Steven's parents had received a treatment plan.[170] Steven and his parents claimed privilege under the MHDDCA and refused to disclose the records.[171]

The court held that Steven did not put his mental health at issue because his guilty plea removed his sanity from being "an issue" in the criminal case and thus, the plea did not constitute a waiver of the privilege for either that case or the subsequent civil proceeding.[172] The court did so even though prior to his guilty plea Steven gave to the State's Attorney a fifty-seven page report prepared by a retained medical expert in defense of his insanity.[173] Finally, the court held that unlike in *D.C. v. S.A.*, Steven's mental health records would not by themselves "establish plaintiff's claims," and accordingly, that the fundamental fairness exception created in *D.C.* did not apply.[174]

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169. In order to succeed on the claims for negligent entrustment, the Norskogs had to show that "[defendants] gave [Steven] express or implied permission to use or possess a dangerous article or instrumentality which [defendants] knew, or should have known, would likely be used in a manner involving unreasonable risk of harm to others." Evans v. Shannon, 776 N.E.2d 1184, 1190 (Ill. 2002) (citing *Norskog*, 755 N.E.2d at 17). *Evans* also notes that even if an instrument is not per se dangerous, it may become so "if it is operated by someone who is incompetent, inexperienced or reckless." *Id.* Whether the Norskogs could have prevailed on the negligent supervision claim is a different matter. In order to prevail on such a claim, the Norskogs would have had to show "that (1) [the Pfiels] were aware of specific instances of prior conduct sufficient to put them on notice that the act complained of was likely to occur and (2) the [Pfiels] had the opportunity to control [Steven]." Appelhans v. McFall, 757 N.E.2d 987, 993 (Ill. App. Ct. 2001). While it is possible that the Norskogs may not have been able to prove the element of control for the latter claim, it appears that having the records to potentially show the Pfiels knowledge of Steven's propensity for violence, and any required parental supervision, would have greatly improved the Norskogs' odds of prevailing on the negligent entrustment case.

170. *Norskog*, 755 N.E.2d at 6.

171. *Id.*

172. *Id.* at 12 (holding that "[b]y pleading guilty, then, [his] sanity was no longer an issue"). The variable results produced from the two interpretive methods are exacerbated by the court's simultaneous use of the "at issue" and "introduction" terminology—though the court concludes that Steven's insanity was not "at issue," *id.*, it also goes on to conclude that the "initial hurdle" in 10(a)(1) disclosure is that the condition is "introduced." *Id.* at 14. The court also discussed the issue of waiver through engagement in a court-ordered psychiatric evaluation to determine fitness for trial and whether the introduction of the insanity defense could waive the privilege in subsequent civil proceedings; both questions were answered in the negative. *Id.* at 13 (finding that because Steven had not been adequately admonished of the possibility of disclosure in subsequent civil proceedings, the examination records were not discoverable).

173. Norskog v. Pfiel, 733 N.E.2d 386, 389 n.2 (Ill. App. Ct. 2000).

174. *Norskog*, 755 N.E.2d at 17. Though the court utilized this distinction of whether or not the records would establish the Norskogs' claims in the context of disallowing an extension of *D.C. v. S.A.*, the court's utilization of an "establish" standard supports the suggestion of this

b. Introducing an Element under Section 10(a)(1)

As demonstrated by *Norskog*, the "at issue" standard, and its related "affirmative" requirement, are both quite strenuous for the proponent of disclosure to overcome.[175] The application of the "at issue" standard has directly prohibited disclosure in several other cases.[176] In contrast, of the panoply of cases discussing section 10(a)(1), only a small percentage consistently apply the standard requiring "introduction" of the recipient's mental health condition.[177] Among these cases, only a few allowed the admission of the records because the mental health condition was actually introduced,[178] and another resulted in the controversial "fundamental fairness" exception.[179]

The *Goldberg v. Davis*[180] decision is instructive in analyzing the application of the "introduction" standard. The *Goldberg* decision followed administrative disciplinary proceedings initiated against a psychiatrist, and the civil proceeding at issue was between the psychiatrist under review and his past patient's current psychiatrist.[181]

Comment that the courts have been creating a standard for admission that is more strenuous than that anticipated by the legislature. *See infra* Parts IV.A.3, V (analyzing the Illinois courts' broad application of the privilege that causes an expansive construction of the section 10(a)(1) language, and proposing a remedy to return to the plain language of the statute). Moreover, the *Norskog* court suggested that the information contained within the records could be obtainable elsewhere, but points only to the allegations of the Norskogs' complaint to support the statement. *Norskog*, 755 N.E.2d at 17 ("Plaintiff's complaint contains factual allegations which, if proven, would support her claim that the Pfiels knew or should have known that Steven was a danger to others. Plaintiff's arguments before this court belie the need for disclosure of privileged information.").

175. *See supra* note 91 and accompanying text (discussing cases that describe section 10(a)(1) as having created a "formidable challenge" to disclosure).

176. *See supra* note 142 (listing cases that utilize the "at issue" standard to assess admissibility of mental health records).

177. *See* D.C. v. S.A., 687 N.E.2d 1032, 1039 (Ill. 1997) ("[D]enial of any contributory negligence . . . does not by itself . . . result in the introduction by plaintiff of his mental condition."); Goldberg v. Davis, 602 N.E.2d 812, 817 (Ill. 1992) (utilizing the "introduction" language to allow admission); Laurent v. Brelji, 392 N.E.2d 929, 932 (Ill. App. Ct. 1979) (interpreting section 10(a)(1) based on the "introduction" standard).

178. *See, e.g.*, *Goldberg*, 602 N.E.2d at 817 (finding that "[the recipient] has introduced her mental condition as well as services received"); *Laurent*, 392 N.E.2d at 931–32 (holding that the "[recipient], incident to an administrative proceeding, introduced an aspect of the services he received for his mental condition (the alleged abuse by Laurent)").

179. *See D.C.*, 687 N.E.2d at 1039–41 (holding that although the recipient's mental condition was not per se introduced in his claim, fundamental fairness required disclosure of records in part because they would have entirely foreclosed defendant's liability); *see also supra* notes 120–32 and accompanying text (discussing *D.C. v. S.A.* and the fundamental fairness exception).

180. *Goldberg*, 602 N.E.2d at 812.

181. *Id.* at 813–16. Defendant-appellant Dr. Goldberg, the physician under investigation in the disciplinary proceedings, sought records from his former patient's current psychiatrist, Dr. Davis, for an *in camera* inspection for use in the disciplinary proceeding. *Id.* at 813. Dr. Davis

The disciplinary board initiated proceedings against Dr. Goldberg after the patient alleged that Dr. Goldberg had engaged in improper sexual conduct during the course of treatment.[182] On interlocutory appeal, the Illinois Supreme Court found that, as the complaining witness to the disciplinary proceedings, the recipient had satisfied the section 10(a)(1) standard because she had introduced aspects of the services received for her condition into the disciplinary proceeding.[183]

To substantiate his defense, however, Dr. Goldberg sought expansive records for the majority of the recipient's psychiatric history in order to prove that the patient's allegations derived from a psychotic transference.[184] The court agreed with Dr. Goldberg that disclosure was appropriate, finding that the issue of whether sexual conduct had occurred relied on the patient's specific psychiatric history, which may have included episodes of psychotic transference.[185] Accordingly, the court held that an *in camera* inspection of her psychiatric records was "imperative" and that without such an inspection, the court "c[ould not] do justice to any of the parties."[186] In contrast to the cases using the "at issue" standard, however, the patient-recipient never "specifically" or "affirmatively" placed her condition "at issue" or made any claim for mental loss.[187] Rather, she merely placed the allegation of sexual

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filed an interlocutory appeal after the circuit court had ordered her to produce those records for *in camera* inspection. *Id.*

182. In the disciplinary proceedings, Dr. Davis refused to turn over her treatment records sought by Dr. Goldberg. *Id.*

183. *Id.* at 817–19.

184. *Id.* at 818–19. Dr. Goldberg sought disclosure of the recipient's past records and asserted that because the patient had a history of psychotic transferences, her allegation of sexual misconduct and memories associated therewith were a result of a psychotic transference rather than his actual misconduct. *Id.*

185. The court went to great lengths to describe the nature and history of the patient's specific illness to support its final conclusion that the records were pertinent to the disposition of the case. *Id.* at 817–18. This analysis was encouraged by the varying testimony of the two psychiatrists: Dr. Goldberg argued that the patient had a "severe borderline personality," whereas Dr. Davis argued that the patient had "only a mild form of borderline personality disorder." *Id.* at 817. Both doctors agreed that transference had indeed occurred, but Dr. Goldberg believed it was not based on reality while Dr. Davis believed it was based on reality. *Id.* at 818. The court defined transference as: "the primarily unconscious tendency of an individual to assign to others in the present those feelings and attitudes originally connected with significant figures during the course of early development." *Id.* (citation omitted).

186. *Id.* at 817–20. The court goes to some length exploring the rationale for this decision, and it appears to be primarily based upon the nature of borderline personality disorder as it pertains to episodes of "psychotic transference." *Id.* at 817–18. Thus, as Dr. Goldberg asserted the defense of the patient's psychotic transference, the records of the patient's treatment history became particularly pertinent in determining whether the conduct in fact occurred or if such beliefs were not based on reality. *Id.* at 818.

187. Though the patient did introduce an aspect of her treatment history in that she asserted

misconduct at issue—which was tangentially related to the services received for that condition—but it was Dr. Goldberg's defense that resulted in the court's approval of very broad discovery into the recipient's psychiatric history.[188]

Laurent v. Brelji, a case decided shortly after the MHDDCA's promulgation, also illustrates the distinction between the "introduction" and "at issue" standards.[189] In *Laurent*, patient-recipient L.S. testified at an administrative discharge proceeding brought by the Civil Service Commission against Dr. Laurent.[190] L.S. testified that Dr. Laurent had harassed and abused him.[191] Finding that L.S.'s testimony was sufficient to introduce his condition or aspects of the services received, the *Laurent* court allowed disclosure of L.S.'s mental health records.[192] The court reasoned that because the term "claim" in the MHDDCA is

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sexual misconduct during her therapeutic relationship with the defendant physician, her condition and the services received for her condition were not per se at issue in either proceeding. Instead, the sexual misconduct that was at issue, with the patient's expansive psychiatric history only related to the defendant's defenses. *Id.* at 818. Under the "at issue" standard, it could also be argued that because her services were at the center of the controversy, they were indeed at issue. Nonetheless, using the rules from myriad cases applying the "at issue" standard, the plaintiff-recipient's commencement of disciplinary proceedings for sexual misconduct would be insufficient to support disclosure because the plaintiff-recipient did not "affirmatively" or "specifically" place her condition "at issue" or assert a claim for mental loss; furthermore, her extensive and entire psychiatric history arose only as an element of the physician's defense. *See supra* notes 147–60 and accompanying text (discussing the courts' application of the "at issue" standard).

188. *Goldberg*, 602 N.E.2d at 816–20 (allowing the production of twelve years of the patient-recipient's psychiatric records for an *in camera* inspection).

189. Laurent v. Brelji, 392 N.E.2d 929, 932 (Ill. App. Ct. 1979).

190. *Laurent*, 392 N.E.2d at 930. After the testimony of the patient, defendant Laurent had served a subpoena *duces tecum* on Dr. Brelji, the patient, L.S.'s, current physician. *Id.* Dr. Brejli filed a motion to quash the subpoena which the administrative disciplinary hearing officer subsequently denied. *Id.* Dr. Laurent and the commission on his behalf then sought judicial review of the decision, and the circuit court entered an order directing Dr. Brejli to produce the requested records for an *in camera* hearing. *Id.*

191. *Id.*

192. *Id.* at 932. In so holding, the court reasoned that "th[e] case provid[ed] a keen example of an instance where the balance of competing values falls on the side of disclosure." *Id.* This was because the "facts and issues before the investigating body relate[d] directly to the witness' hospitalization . . . incident in question specifically arose out of the hospitalization . . . [and] [t]he respondent . . . would necessarily know the identity of the witness." *Id.* The *Laurent* court was also sure to confirm that its decision "in no manner implie[d] that a person, merely by presenting himself as a witness, must run the risk of having his entire mental history drug out and exposed before a public hearing for the ostensible purpose of questioning his perceptive capabilities." *Id.* at 932–33. This reasoning supports the suggestion of this Comment that compliance with the plain language of the statute will not result in the unwarranted disclosure of mental health records for improper purposes. *See also infra* Part V.B (proposing that the Illinois courts return to an interpretation of the MHDDCA based in part on traditional doctrines of statutory construction).

"not synonymous with cause of action," it was irrelevant that the proceeding occurred in an administrative instead of judicial capacity.[193]

2. Prongs Two and Three: The Forgotten Protections

Almost all of the cases applying the MHDDCA within the context of section 10(a)(1) stop the discussion after finding that the proponent of admission has met—or more likely, has failed to meet—the first prong.[194] As a result, it is unclear how the courts would assess evidentiary admissibility under the second prong of section 10(a)(1).[195] This aspect is particularly important because, even after the court finds the proponent or recipient to have satisfied the first prong of introducing his or her condition or aspects of the services received, the court must still make a finding that the proposed evidence "is relevant, probative, not unduly prejudicial or inflammatory, and otherwise clearly admissible."[196]

Under the third prong of section 10(a)(1), the proponent of admission must also show that the other evidence is "demonstrably unsatisfactory"[197] and that the proposed admission serves the interests

193. *Laurent*, 392 N.E.2d at 932.

194. *See, e.g.*, Reda v. Advocate Health Care, 765 N.E.2d 1002, 1009–11 (Ill. 2002) (not discussing second prong); Chi. Hous. Auth. v. Human Rights Comm'n, 759 N.E.2d 37, 51 (Ill. App. Ct. 2001) (finding that even if records were admissible, defendant failed to show that administrative law judge "made the specific and necessary findings that section 10(a)(1) requires before mental health evidence can be allowed"); Sassali v. Rockford Mem'l Hosp., 693 N.E.2d 1287, 1290 (Ill. App. Ct. 1998) (finding only that trial court did not make the required findings under the second and third prongs, not the way in which the trial court would make such findings); Mandziara v. Canulli, 701 N.E.2d 127, 133 (Ill. App. Ct. 1998) (criticizing the trial court for rendering records admissible without considering the evidentiary admissibility under the second prong or weighing recipient's privacy interests against substantial justice); People v. Phipps, 424 N.E.2d 727, 730 (Ill. App. Ct. 1981) (stopping analysis after finding defendant's right to confront was stronger than privilege). Though the court in *Goldberg* discussed the requirements of the second prong, it did so within the context of establishing the importance of the *in camera* inspection of the records to determine whether the records were unduly prejudicial, inflammatory, and their probative value on the issue of whether the transference had occurred. Goldberg v. Davis, 602 N.E.2d 812, 819 (Ill. 1992). Additionally, because the *Norskog* court held that the Norskogs had not satisfied the burden of the first prong of section 10(a)(1), the court did not reach the issue of whether the evidence would otherwise be admissible except for its allusion to the fact that "such broad discovery orders would be unwarranted [even if the court found the fundamental fairness exception to apply]." Norskog v. Pfiel, 755 N.E.2d 1, 17–18 (Ill. 2001). *But see* D.C. v. S.A., 687 N.E.2d 1032, 1041 (Ill. 1997) (finding records were relevant, probative, admissible, not unduly prejudicial, and not obtainable elsewhere).

195. 740 ILL. COMP. STAT 110/10(a)(1) (2008).

196. *Id.*

197. *Id.*; *see also Goldberg*, 602 N.E.2d at 819 (showing existing evidence met the "demonstrably unsatisfactory" requirement because the only existing evidence was testimony of the psychiatrists and patient, and "[w]ithout further evidence, *i.e.*, past therapy, experiences, etc., the evidence is unsatisfactory").

of substantial justice and outweighs any potential injury that might result from disclosure.[198] This may include establishing that there are compelling interests in support of production.[199] Again, however, because most of the decisions on point foreclose the opportunity for disclosure at the first prong of section 10(a)(1), the courts have largely left unresolved how they would assess the evidentiary value of mental health records once they pass through the first prong. Nonetheless, it is clear that the findings must always be made, and disclosure is not appropriate where the court only finds that the first prong has been satisfied.[200]

3. Alternate Admissibility: Waivers[201]

The courts have additionally established that a recipient can satisfy the section 10(a)(1) exception by waiving his or her privilege, although

198. 740 ILL. COMP. STAT 110/10(a)(1) (2008) (requiring the court to find that "disclosure is more important to the interests of substantial justice than protection from injury to the therapist-recipient relationship or to the recipient or other whom disclosure is likely to harm").

199. Laurent v. Brelji, 392 N.E.2d 929, 933 (Ill. App. Ct. 1979). In a case of first impression, the Illinois Supreme Court has additionally held that the MHDDCA applies retroactively, and thus, the privilege covers records "created prior to the effective dates of the statutes." Wisniewski v. Kownacki, 851 N.E.2d 1243, 1249 (Ill. 2006).

200. *See infra* note 326 and accompanying text (citing to cases wherein the court's failure to reach the findings required by the second and third prongs of 10(a)(1) was dispositive of the propriety of disclosure).

201. A variety of cases also discuss the application of the MHDDCA within the context of establishing or testing a witness's credibility, particularly because case law suggests that a witness's mental condition is relevant for purposes of impeachment or credibility. *See* People v. Williams, 588 N.E.2d 983, 1008 (Ill. 1991) ("[E]vidence of a witness' mental health history . . . is relevant as it relates to credibility, and is thus a permissible area of impeachment, [but] before such evidence may be introduced its relevance must be established."); People v. Hogan, 904 N.E.2d 1036, 1046–47 (Ill. App. Ct. 2009) ("[I]n determining credibility of a witness or the weight to be accorded to his [or her] testimony, regard is generally given to [the witness's] mental condition. Almost any emotional or mental defect may materially affect the accuracy of testimony.") (quotation omitted); People v. Plummer, 743 N.E.2d 170, 179 (Ill. App. Ct. 2000) (citation omitted) (noting that a witness's mental health history is a permissible area of impeachment); People v. Dace, 449 N.E.2d 1031, 1035 (Ill. App. Ct. 1983) (holding that when a court is "[c]onfronted with articulable evidence that raises a reasonable inquiry of a witness's mental health history, [it] should permit a defendant to discover that history"). This issue is complicated by the fact that, in criminal cases, the need to protect confidentiality must be balanced with the defendant's constitutional right to cross examination of adverse witnesses. Roberts v. Norfolk & W. Ry. Co., 593 N.E.2d 1144, 1157 (Ill. App. Ct. 1992) (Cook, J., concurring) (citing People v. Bean, 560 N.E.2d 258, 273–74 (Ill. App. Ct. 1990)) ("In criminal cases the public policy in maintaining the confidentiality of mental health records is subordinate to a defendant's constitutional right to effectively cross-examine an adverse witness to show bias."); *see also* People v. Phipps, 424 N.E.2d 727, 730 (Ill. App. Ct. 1981) ("When . . . a statutory evidentiary privilege comes in direct conflict with the defendant's constitutional rights of confrontation and due process, we hold that the former must give way so that the fundamental protections of our criminal justice system will not be abrogated.").

only limited situations trigger the waiver's application.[202] This principle is congruent with the idea that the MHDDCA is designed as "a shield."[203] Thus, though section 10(a)(1) does not expressly set forth that a party waives the privilege by introducing records protected by the MHDDCA,[204] the courts have held that a waiver occurs where the recipient satisfies the criteria for disclosure under an "at issue" or "introduction" standard[205] or permits disclosure.[206] Moreover, a waiver in one proceeding may constitute a waiver in subsequent proceedings, and a waiver as to one physician will waive the privilege for all other physicians treating the recipient for the same condition.[207] This waiver generally includes alleging an insanity defense and calling a medical expert to trial to support the defense.[208]

The definition of a prior proceeding, however, complicates the waiver issue.[209] As section 10(a) states, a prior proceeding consists of both a civil, criminal, or "other proceedings" and any proceedings "preliminary thereto."[210] The courts, however, have construed the term "proceeding" strictly against the party seeking admission.[211] The

202. Norskog v. Pfiel, 755 N.E.2d 1, 14 (Ill. 2001).

203. *Id.* at 16; People v. Gemeny, 731 N.E.2d 844, 852 (Ill. App. Ct. 2000) ("Fundamental fairness . . . does not require that defendant surrender his statutory privilege" where defendant is not using statute "as a sword.").

204. 740 ILL. COMP. STAT 110/10 (2008).

205. *See supra* Part III.B.1.b (discussing application of "introduction" standard in various Illinois cases).

206. *See, e.g.*, Novak v. Rantham, 478 N.E.2d 1334, 1337–38 (Ill. 1985) (noting that if disclosure occurs or the recipient permits disclosure, "the privilege is waived and cannot be reasserted"); *see also* People v. Leggans, 625 N.E.2d 1133, 1139 (Ill. App. Ct. 1993) ("[F]ailure to contemporaneously object and specifically include the issue [of improper disclosure] in a post-trial motion results in waiver of the issue on appeal.").

207. *Novak*, 478 N.E.2d at 1337 (noting that a waiver as to one physician constitutes a waiver as to another physician). *But cf. Norskog*, 755 N.E.2d at 12 (finding that waiver as to privilege in criminal determination of fitness to stand trial did not waive the privilege in the subsequent civil proceeding). A separate but related point is whether a provider can waive the privilege. *See generally* House v. SwedishAmerican Hosp., 564 N.E.2d 922 (Ill. App. Ct. 1990) (discussing waiver in the context of section 3(a) definition).

208. *Novak*, 478 N.E.2d at 1337 (observing that "a waiver at a former trial should bar a claim of the privilege at a later trial") (citation omitted).

209. This is so because many of the cases discussing the application of section 10(a)(1) do so in the context of whether the defendant has waived his or her privilege to confidentiality because of the introduction of records in, what the proponent of admission considers, a "prior proceeding." *See, e.g.*, Chi. Hous. Auth. v. Human Rights Comm'n, 759 N.E.2d 37, 51 (Ill. App. Ct. 2001) (finding administrative hearing insufficient forum for waiver because by the time the hearing began, the recipient's amended complaint no longer asserted discrimination based on mental illness).

210. 740 ILL. COMP. STAT 110/10(a) (2008).

211. *See, e.g.*, *Norskog*, 755 N.E.2d at 13; People v. Gemeny, 731 N.E.2d 844, 850 (Ill. App. Ct. 2000) (finding limited disclosure in sentencing phase of domestic violence case did not result

Norskog decision—where the defendant's intentional introduction of a detailed insanity defense was insufficient to trigger section 10(a)(1)'s exception for disclosure—exemplifies this strict application of the section 10(a)(1) waiver.[212] Nonetheless, where the court is unclear as to the existence of a waiver, the recipient's expectation of confidentiality can be outcome determinative as to whether any such waiver occurred.[213]

IV. ANALYSIS

As the preceding Parts demonstrate, the exceptions to the MHDDCA's privilege are perceived to be "very narrow" and as a result, courts express great discomfort at requests for disclosure.[214] Indeed, as Part III demonstrated, the courts have predominantly applied a standard of admissibility that is far more strenuous than that anticipated by the legislature, requiring an "affirmative" placement of one's condition "at issue."[215] Taken as a whole, however, section 10(a)(1) creates a much less strenuous standard of admission, that of mere "introduction."[216] Thus, it appears that the courts have departed from the plain language of the statute by broadly applying the privilege and expansively construing section 10(a)(1)'s "introduction" language to include "at issue" as well.[217] This construction has skewed the courts' ability to maintain the

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in the defense's right to involuntary disclosure of the records in a subsequent case). The court in *Gemeny* also relied on the fact that the defendant had not consented to the treatment because it was court ordered. *Gemeny*, 731 N.E.2d at 850.

212. *See supra* note 172 and accompanying text (discussing *Norskog* court's rationale for excluding psychiatric records on the basis that no waiver occurred when the recipient asserted his insanity defense).

213. Sangirardi v. Vill. of Stickney, 793 N.E.2d 787, 799 (Ill. App. Ct. 2003) (citing Scott v. Edinburg, 101 F. Supp. 2d 1017, 1020 (N.D. Ill. 2000)). This was dispositive for the plaintiff in *Sangirardi*, for the court held that because plaintiff was a police officer and therefore had "no reasonable expectation that the results of his fitness exam would be kept confidential from [his Chief]," the officer could not assert the privilege in precluding his Chief Officer from obtaining said results. *Id.* at 799; *cf.* McGreal v. Ostrov, 368 F.3d 657, 686–88 (7th Cir. 2004) (holding that because officer's consent to disclosure was signed under duress, though the MHDDCA did not provide an exception for disclosure with respect to police departments and mental health fitness examinations, the consent form was insufficient to allow disclosure in face of the intent of the MHDDCA to "restrict disclosure to that which is necessary to accomplish a particular purpose"). It is notable that the Court of Appeals for the Seventh Circuit stated in *McGreal* that the *Sangiardi* decision was "in tension with *Norskog*." *McGreal*, 368 F.3d at 690.

214. 11 ILL. PRACTICE SERIES, COURTROOM HANDBOOK ON ILL. EVID. § 503.5, at 2 (2009 ed.) (citing *Chi. Hous. Auth.*, 759 N.E.2d at 51; Sassali v. Rockford Mem'l Hosp., 693 N.E.2d 1287, 1289 (Ill. App. Ct. 1998)).

215. *See supra* Part III.B.1.a (discussing application of "at issue" standard in Illinois courts).

216. *See supra* Parts III.A.1–3 (discussing sections and definitions of the MHDDCA and section 10(a)(1)).

217. *See supra* Parts III.A.3, III.B.1 (highlighting specific text of section 10(a)(1) and

apparent legislative intent, namely disclosure when the interests of substantial justice so require[218] and avoidance of an absolute prohibition against disclosure.[219]

To discuss the propriety of the Illinois courts' application of the "at issue" versus "introduction" standard, this Part will analyze both the "at issue" and "introduction" standards as they generally apply in the judicial context.[220] This Part will then discuss the effects of the variable interpretive methods applied by the Illinois courts.[221] Here, particular emphasis will be placed on how the courts' departure from the "introduction" standard has precluded disclosure of records in cases in which the statute's plain language appears to allow for disclosure.[222]

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discussing the Illinois cases apparently deviating from the plain language of section 10(a)(1)).

218. 740 ILL. COMP. STAT 110/10(a)(1) (2008). The term "substantial justice" is relied on in myriad judicial settings. *See, e.g.*, Hanson v. DeKalb County State's Attorney's Office, 909 N.E.2d 903, 909–10 (Ill. App. Ct. 2009) (using the substantial justice standard to determine the propriety of a Department proceeding pertaining to the plaintiff's right to possess a firearm); Jackson v. Bailey, 893 N.E.2d 280, 283 (Ill. App. Ct. 2008) ("Whether substantial justice is being achieved . . . is not subject to precise definition, but relevant considerations include diligence or the lack thereof, the existence of a meritorious defense, the severity of the penalty resulting from the order or judgment, and the relative hardships on the parties."); Gordon v. Gordon, 887 N.E.2d 35, 38 (Ill. App. Ct. 2008) (citing Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945)) (using the concept of substantial justice to determine the propriety of the court's exercise, or lack thereof, of personal jurisdiction over the defendant); People v. Cearlock, 887 N.E.2d 893, 902 (Ill. App. Ct. 2008) (citation omitted) (citing to trial court's discretion to declare a mistrial when, according to the trial judge, substantial justice cannot be obtained without discontinuing the trial); Morgan v. Dep't of Fin. & Prof'l Regulation, 871 N.E.2d 178, 188 (Ill. App. Ct. 2007) (using the concept of substantial justice within the context of a professional Director's discretion to determine the propriety of an administrative decision regarding defendant's ability to maintain his professional licensure); Trossman v. Philipsborn, 869 N.E.2d 1147, 1172 (Ill. App. Ct. 2007) (citing to the statute and noting that "pleadings are to be liberally construed to do substantial justice between the parties"); Deutsche Bank Nat'l v. Burtley, 861 N.E.2d 1075, 1080 (Ill. App. Ct. 2006) (applying the "substantial justice" standard to determine the propriety of the district court's decision to deny a motion to vacate for an abuse of discretion and implying that substantial justice includes whether an end result is just or fair).

219. This intent is evidenced by the legislature's inclusion of instances in which the propriety of non-consensual disclosure outweighs the individual right to confidentiality. *See supra* note 97 and accompanying text (citing to cases that note that the MHDDCA privilege is not absolute); *see also* COMMISSION REPORT, *supra* note 89, at 5 (noting that "several new exceptions" were added to the proposed revision of confidentiality laws).

220. *See infra* Parts IV.A.1–2 (analyzing the "at issue" versus "introduction" standards).

221. *See infra* Part IV.A.3 (utilizing general definitions of "at issue" and "introduction" to analyze the Illinois court's different interpretive methods).

222. *See infra* Part IV.A.3 (discussing the potential outcome of past cases if the introduction standard had been applied).

A. Elements of the Recipient's Claim or Defense: "At Issue" Versus "Introduction"

To illustrate the cognizable distinctions between the "at issue" and "introduction" standards, this section will first briefly discuss the "at issue" and "introduction" standards as they apply outside the context of the MHDDCA.[223] Then, this section will contrast the application of the "at issue" and "introduction" standards to prove the superiority of the "introduction" standard.[224]

1. Placing an Element "At Issue," Generally

In order to explore the propriety of the Illinois courts' application of the "at issue" standard, a brief discussion of the "at issue" doctrine in other contexts is required. First, the plain definition of "at issue" encompasses anything that is "in dispute" or "at variance."[225] There are varying descriptions of "at issue" in case law, including that an element is not "at issue" where nothing has been said with respect to that issue,[226] but also that where there is a dispute pertaining to an element, it is "at issue."[227] Precedent suggests that it is the latter definition that is controlling, namely something is "at issue" if it is a central part of the controversy in question.[228] Moreover, in the criminal context an "element" to a claim constitutes anything that "negatives an excuse for the conduct at issue;"[229] this suggests that in the hierarchy of procedural assertions, something that is "at issue" earns a more highly controversial position than something that is merely introduced as an element of such

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223. *See infra* Parts IV.A.1–2 (analyzing the "at issue" and "introduction" standards independent of the MHDDCA).

224. *See infra* Part IV.A.3 (detailing the effect of utilizing the introduction standards).

225. BLACK'S LAW DICTIONARY 383 (3d pocket ed., 1996) [hereinafter BLACK'S] ("[I]ssue: A point in dispute between two or more parties."); OXFORD AM. DICTIONARY 419 (1999).

226. *See* Rapanos v. United States, 547 U.S. 715, 746 (2006) (finding dissent's reliance on definition of an element/issue from a prior case was improper where the prior case did not place the element "at issue" because the decision "said nothing" about the issue). In so holding, the Court noted that it was "wholly implausible" that the prior case controlled *Rapanos* because the particular definition before the Court was not "at issue" in the prior case because nothing was said about it. *Id.*

227. *See supra* Part III.B.1.a (discussing "at issue" standards of admissibility under the MHDDCA).

228. *See* Dixon v. United States, 548 U.S. 1, 12–13 (2006) (discussing "at issue" in the context of the specific statutory crimes alleged to have been committed by defendant); Nike, Inc. v. Kasky, 539 U.S. 654, 663 (2003) (Stevens, J., concurring) (describing speech that is crux of controversy as that which is "at issue"); *see also* BLACK'S, *supra* note 225, at 383 ("[I]ssue: A point in dispute between two or more parties."); *supra* note 12 and accompanying text (citing to *Shafer v. South Carolina* and discussion regarding "at issue").

229. *Dixon*, 541 U.S. at 16 (citing ALI, MODEL PENAL CODE § 1.13(9)(c) (2001)).

an assertion. This further indicates that simply introducing something as a partial element of a claim or defense involves less affirmative behavior than, at a later time, legally proving each of the required elements of a cause of action or defense or even per se alleging that specific claim or defense.[230]

2. Introducing an Element, Generally

In contrast to the "at issue" standard,[231] in plain language to "introduce" something means to "make known," "announce or present," or "bring into use."[232] Though the precise definition of the "introduction" standard in the judicial context is somewhat unclear due to a dearth of decisions directly on point, the United States Supreme Court has recognized that there is in fact a cognizable difference between merely introducing an element and affirmatively placing such element "at issue."[233]

The Fourth District Illinois Appellate Court has also articulated that there is a distinction specifically with respect to the MHDDCA by noting that the privilege created by the MHDDCA may be waived either by introducing one's mental health condition *or* placing this condition at issue.[234] Indeed, intuition suggests that merely introducing an element is not the same as affirmatively placing the element at issue—the former requires only a suggestion of relevancy or admissibility.[235] In contrast, to affirmatively place an element directly "at issue" in a cause of action or defense requires that the element in question have concrete legal substantiation.[236] This is a higher standard than the introduction

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230. *See infra* note 236 and accompanying text (discussing Federal Rule of Civil Procedure 11 which defines the legal substantiation required in pleadings).

231. *See supra* Part IV.A.1 (discussing the "at issue" standard).

232. OXFORD AM. DICTIONARY 415 (1999); *see also, e.g.*, BLACK'S, *supra* note 225, at 380 ("[I]ntroduce into evidence: To have (a fact or object) admitted into the trial record, allowing it to be considered . . . in reaching a decision").

233. *See supra* note 12 and accompanying text (discussing *Shafer v. South Carolina* decision in which the Supreme Court delineated the distinction between the "at issue" and "introduction" standards).

234. Roberts v. Norfolk & W. Ry. Co., 593 N.E.2d 1144, 1153 (Ill. App. Ct. 1992) (finding that the defendant "suggests [recipient] has waived this privilege by introducing his mental condition . . . this privilege can also be waived by placing one's mental condition in issue").

235. *See also infra* notes 275–77 (discussing broad relevancy for discovery and need for liberal discovery).

236. This idea is confirmed through the Federal Rules of Civil Procedure, the established requirements for pleading a cause of action, and the sanctions associated with filing documents with the court for which there is no legally established basis. *See* FED. R. CIV. P. 11(b):

> By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party

standard described above, especially considering the broad definition of relevancy during non-pleading periods such as discovery.[237]

3. Effect of Using the "Introduction" Standard

As the preceding sets forth, the distinction between the "at issue" and "introduction" standards is meaningful, nuanced, and cognizable, particularly within the MHDDCA and section 10(a)(1).[238] The critical evaluation, though, is how the cases applying section 10(a)(1) would change if the Illinois courts were to apply the "introduction" standard. This section seeks to assess those changes.

In *Norskog* and cases similarly using an expansive construction of the "introduction" language to include the "at issue" standard,[239] precluding disclosure after an analysis of only the first prong of section 10(a)(1) was dispositive of some aspect of the claim.[240] Several cases have followed this incomplete approach, and *Norskog* epitomizes the danger of broadly applying the privilege beyond the statute's plain language. In *Norskog*, defendant Steven clearly introduced his condition by not only asserting the insanity defense, but also by retaining an expert witness to assess his mental health and submitting to his opponent a substantial document supporting his insanity.[241] The court was correct that after his plea Steven's mental health was no longer "at issue" in the case.[242] But it is difficult to conceive of how Steven's explicit and detailed insanity defense was insufficient to "introduce" his condition. The confusing application of section 10(a)(1) in the court's decision is exacerbated by the fact that the statute's plain language provides that introducing the recipient's condition can occur both at a proceeding and

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> certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . . (2) the claims, defenses, and other legal contentions are warranted by existing law . . . .

Id.

237. *See infra* notes 275–77 and accompanying text (discussing definitions of relevancy during discovery and trial).

238. *See supra* Parts IV.A.1–2 (discussing "at issue" and "introduction" standards generally) and *supra* Part III.B.1 (analyzing in depth the *Goldberg* and *Norskog* decisions and their relative importance with respect to the application of the two standards).

239. *See supra* Part III.B.1.a (analyzing cases applying the "at issue" standard).

240. *See infra* note 326 and accompanying text (discussing cases for which the failure to reach the second and third prongs of section 10(a)(1) affected the appellate court's determination of the propriety of disclosure/lack of disclosure in the trial court).

241. *See supra* note 173 and accompanying text (noting document submitted in support of Steven's insanity defense).

242. *See supra* note 172 and accompanying text (citing to *Norskog* court's decision that Steven's plea of guilty absolved him from ever having put his mental health at issue).

in any preceding proceeding,[243] and subsequent cases have found that "preceding proceeding" can include discovery and other documents submitted to the courts.[244]

Under a literal application of the "introduction" standard, then, it is highly likely that the requested records would have been admissible. This is particularly so because plaintiffs were not engaging in a "fishing expedition" for inflammatory information, nor would the statute even allow the discovery of the psychotherapist's personal notes.[245] Plaintiffs sought information specific to defendant's liability, and their failure to receive this information was likely dispositive to those claims.[246] Moreover, unlike *Chicago Housing*, where the plaintiff-recipient retracted his claim for mental suffering,[247] Steven never retracted his insanity defense but instead plead guilty only after committing his second murder.[248] Lastly, using *Laurent's* rationale,[249] Steven's mental health was well known to both parties as Steven had made his intent to plea insanity, and his mental illness, very clear. Thus the policy reasons to preclude disclosure to avoid stigmatization no longer existed, and the court's utilization of the "at issue" instead of

243. 740 ILL. COMP. STAT. 110/10(a) (2008).

244. *See supra* note 158 and accompanying text (discussing *Reda* decision that established definitions of "preceding proceeding" as it applies to proceedings through which the privilege can be waived).

245. 740 ILL. COMP. STAT. 110/3 (2008). This fear of "fishing expeditions" existed prior to the promulgation of the MHDDCA. *See, e.g.*, Tylitzki v. Triple X Serv., Inc., 261 N.E.2d 533, 536 (Ill. App. Ct. 1970) (holding that the "extension of defendant's argument is to urge that whenever a plaintiff who has been under psychiatric care testifies at a trial, the defendant should be allowed to call the plaintiff's psychiatrist to the stand . . . [to] give a detailed analysis of the plaintiff's mental condition").

246. Norskog v. Pfiel, 755 N.E.2d 1, 5 n.2 (Ill. 2001) ("Among the numerous factual allegations contained in the amended complaint, plaintiff claimed 'on information and belief' that Steven began receiving 'professional psychiatric treatment' at the age of nine . . . [p]laintiff seeks to verify this and other allegations through discovery."). This suggests that plaintiffs did not in fact have sufficient evidence to prove those allegations by the standards required at trial, and thus the need in the first place to discover such records. *See also supra* note 169 and accompanying text (discussing Norskog's burden of proof and persuasion on their claims for negligent entrustment and negligent supervision, both of which required proof of the element of knowledge).

247. Chi. Hous. Auth. v. Human Rights Comm'n, 759 N.E.2d 37, 51 (Ill. App. Ct. 2001) (finding mental health not at issue because the "[recipient] did assert a claim that involved his mental health, but he amended the charge and withdrew the claim completely long before the cause was even addressed").

248. *Norskog*, 755 N.E.2d at 5 ("Initially, Steven pleaded not guilty . . . and gave notice that he would assert an insanity defense . . . . Thereafter [the subsequent murder of his brother], Steven entered into a negotiated plea agreement.").

249. *See supra* notes 189–93 and accompanying text (discussing the *Laurent* decision and its implications for the "introduction" standard).

"introduction" standard undermined the enumerated goal of section 10(a)(1) to disclose records where the condition has been introduced.[250]

Additionally, under a strict application of the "at issue" test, the plaintiff in *D.C. v. S.A.* would have been able not only to recover damages based on the defendant's alleged negligence, but also to stigmatize defendant with liability on a negligence action.[251] Though the propriety of the "fundamental fairness" exception carved out by *D.C. v. S.A.* is controversial for many reasons,[252] the court may not have needed to reach that determination by going beyond the plain language because section 10(a)(1)'s plain language would have likely allowed admission. D.C. introduced his condition by putting opposing counsel on notice, even if inadvertently, that he may have been attempting suicide at the time of the accident,[253] thus meeting the requirement that the condition be introduced during the proceedings.[254] Counsel was not seeking the information for undue prejudice or inflammatory effect, and surely it was relevant to the case as it absolved S.A. of liability.[255] Under "at issue," though, because D.C. did not "affirmatively" place his

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250. *See supra* Part III.A.3 (discussing section 10(a)(1) and the three-pronged test for admissibility).

251. *See supra* notes 120–26 and accompanying text (discussing *D.C. v. S.A.* and noting that plaintiff had brought a personal injury suit predicated on the negligence of the defendant, though it later was discovered that plaintiff himself was the cause of the accident).

252. *See supra* note 132 and accompanying text (discussing amicus briefs filed in *Norskog* that underscored recipient's fear of unwarranted disclosure as a result of the *D.C.* decision). The decision may also be controversial because it is an example of "legislating from the bench" in that the court created an exception that was not contemplated nor enumerated by the legislature; "legislating from the bench" refers to a judicially created exception that the plain language of a statute does not proscribe. *See* Bruce G. Peabody, *Legislating from the Bench: A Definition and a Defense*, 11 LEWIS & CLARK L. REV. 185, 200–02 (2007) (describing various definitions of "legislating from the bench"). It is also often used by political candidates to tout their judicial ideologies and dictate the extent to which the courts should be allowed to engage in "judicial policy making." Jeffrey Rosen, *What's Wrong With Legislating from the Bench?*, TIME, July 16, 2009, http://www.time.com/time/politics/article/0,8599,1910714,00.html (citing then-Supreme Court Justice nominee Sonia Sotomayor) ("The duty of a judge is to follow the law, not to question its plain terms . . . I trust that Congress would prefer to make any needed changes itself, rather than have courts do so for it."); Posting of Andante Higgins to CBS News Blogs, http://www.cbsnews.com/blogs/2008/02/11/politics/fromtheroad/entry3819847.shtml (Feb. 11, 2008, 21:16 EST) (citing Presidential Nominee John McCain) (describing McCain's campaign statement regarding Supreme Court nominees: "I tell you I will nominate only people who have a clear, complete adherence to the Constitution of the United States and do not legislate from the bench").

253. D.C. v. S.A., 687 N.E.2d 1032, 1035 (Ill. 1997).

254. *See also supra* note 158 and accompanying text (discussing the *Reda* court's acknowledgement that a prior proceeding includes pleadings and discovery).

255. *D.C.*, 687 N.E.2d at 1041 ("[T]he information plaintiff seeks to protect potentially contradicts his assertion that defendants were negligent and caused the accident. The information has the potential to completely absolve defendants from any liability.").

condition "at issue," disclosure was not proper under that standard and because disclosure seemed imperative, the court had to create an alternative standard that has basically been rejected by subsequent courts attempting to apply section 10(a)(1).[256]

Sassali v. Rockford Memorial Hospital is another case that may have turned out differently if the court had applied the "introduction" standard. In *Sassali*, the plaintiff-recipient Sassali sought to refute allegations of mental instability when the defendant-hospital Rockford Memorial initiated involuntary commitment proceedings against her.[257] Nonetheless, the court found that because Sassali had not "affirmatively" placed her condition at issue, she did not waive the privilege.[258] The departure from the statute's plain language is quite clear in this case; though it was Rockford Memorial that placed Sassali's condition *at issue* in the proceedings, Sassali likely introduced her condition, or aspects of the services received, as an element of her defense.[259] Thus, under the plain language "introduction" standard, disclosure may have been appropriate.[260]

These decisions illustrate that in contrast to the plain language of the statute, the "at issue" standard imposes on the proponent of disclosure a greater burden of showing how and why the recipient's mental health came into a proceeding. The *Goldberg v. Davis* and *Laurent v. Brelji*

256. *Id.* at 1040 (citing to *Tylitzki* and *Webb*, both of which set forth the "affirmative" element of the "at issue" standard, to conclude that the plaintiff did not introduce his condition into the proceeding); *see also supra* note 131 (citing to cases that discuss *D.C. v. S.A.* but decline to follow its reasoning).

257. Sassali v. Rockford Mem'l Hosp., 693 N.E.2d 1287, 1289 (Ill. App. Ct. 1998). In *Sassali*, the plaintiff-recipient brought suit alleging that "the trial court erred in finding that the [MHDDCA] authorized defendants . . . to release plaintiff's mental health records to a court expert." *Id.* at 1289. The suit was initiated following an involuntary commitment proceeding whereby Rockford hospital released the plaintiff-recipient's medical records to the physician charged with reviewing her commitment. *Id.*

258. *Id.* at 1289–90. The court further reasoned that "even if [the] plaintiff had introduced her mental condition as a claim or defense, Rockford ha[d] presented no evidence to show that the trial court made the numerous and explicit findings that section 10(a)(1) requires." *Id.* at 1290.

259. The *Sassali* decision is unclear with respect to the extent to which the plaintiff had introduced her condition as the court dismisses the possibility of disclosure because the plaintiff-recipient did not put her condition at issue. *Id.* at 1289–90. Nonetheless, the language of the decision suggests that Sassali may have introduced her condition in responding to the involuntary commitment proceedings. *See id.* (noting disagreement with defendant's contention that Sassali put her condition at issue by responding to the commitment proceedings, but only on the basis that it was not an affirmative placement of her condition).

260. See, e.g., the rationale from *Laurent* wherein the court allowed disclosure on the basis that the facts and issues directly related to the recipient and the recipient's hospitalization and the parties in such a situation "would necessarily know the identity of the witness and the fact of his mental treatment." Laurent v. Brelji, 392 N.E.2d 929, 932 (Ill. App. Ct. 1979); *see also supra* notes 231–37 and accompanying text (delineating definitions of "introduction").

decisions support this view that the "at issue" standard is much more strenuous than the "introduction" standard. In *Goldberg*, under the "at issue" standard, the plaintiff's allegations of sexual misconduct may not have been sufficient to merit disclosure because the plaintiff did not place her condition "affirmatively at issue" or make any claim for mental suffering.[261] Moreover, the patient-recipient's extensive mental health history was only introduced through the defendant's defense, a factor that under the "at issue" test can preclude the admission of protected records.[262] Similarly, in *Laurent*, the court concluded that even though recipient L.S. was not a party to the litigation, as a complaining witness he sufficiently introduced aspects of his services, and because disclosure was not for the purposes of "ostensibl[y] . . . questioning [L.S.'s] perceptive capabilities," disclosure was warranted.[263]

The *Goldberg* and *Laurent* courts' application of the statutory language suggests that the decisions aligned with the language of the statute because they relied on the need to only "introduce," in congruence with the plain and ordinary meaning of the term,[264] aspects of the services received by the recipient.[265] Particularly given that the numerous enumerated exceptions in the MHDDCA demonstrate that the privilege is not absolute,[266] a literal construction of the first prong of section 10(a)(1) would not eviscerate the MHDDCA nor negate the

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261. *See supra* notes 180–88 and accompanying text (discussing the *Goldberg* decision).

262. For examples of cases in which disclosure was precluded in part because it was the non-recipient that sought disclosure, see Reda v. Advocate Health Care, 765 N.E.2d 1002, 1009 (Ill. 2002) ("[I]t is not enough that defendants, under their theory of the case, placed [the recipient's] mental condition at issue."); *D.C.*, 687 N.E.2d at 1039 ("[I]t was the defendants who actually raised the issue of plaintiff's negligence in this case."); Chi. Hous. Auth. v. Human Rights Comm'n, 759 N.E.2d 37, 50 (Ill. App. Ct. 2001) ("CHA [defendant], as the party seeking to introduce this evidence, bore the burden of establishing its relevance."); People v. Gemeny, 731 N.E.2d 844, 851 (Ill. App. Ct. 2000) ("[I]nsofar as defendant's mental condition or any aspect of his services was placed in issue, it was the State that did so."); Mandziara v. Canulli, 701 N.E.2d 127, 133 (Ill. App. Ct. 1998) (precluding disclosure in part because "Mandziara did not introduce the issue of her mental health. Her husband, though his lawyer, did"); *Sassali*, 693 N.E.2d at 1290 ("[P]laintiff did not place her mental condition at issue. Rather, by filing the petition for involuntary admission, the State placed plaintiff's mental condition at issue.").

263. *Laurent*, 392 N.E.2d at 932–33.

264. *See supra* Part IV.A.2 (discussing the general meaning of "introduce into evidence").

265. 740 ILL. COMP. STAT. 110/10(a)(1) (2008).

266. Goldber*g* v. Davis, 602 N.E.2d 812, 817 (Ill. 1992); *see also supra* note 97 and accompanying text (citing to cases that acknowledge that the MHDDCA privilege is not absolute). Though the term "absolute" suggests that the privilege would require a complete bar to communications, in the scope of evidentiary privileges "absolute" "means that if the privilege applies and there is no applicable exception to its scope, the opposing party cannot defeat the privilege by an ad hoc, case-specific showing of need for the privileged information." THE NEW WIGMORE, *supra* note 1, at 139–40.

purpose and spirit behind the MHDDCA. Indeed, as noted in Part III, the provisions of the modern MHDDCA suggest the legislature intended to expand the scope of the waiver of confidentiality,[267] not create a "formidable challenge" to all proponents of disclosure.[268] This intent is especially true in light of the remaining provisions of section 10(a)(1), which provide for additional evidentiary protections against unwarranted disclosure.[269] The Illinois courts, however, have not reached these provisions, and as a result, the existing precedent departs from the MHDDCA's plain language.[270]

B. Protections Beyond the First Prong: Undue Prejudice, Relevancy, and Inflammatory Effect[271]

As discussed in the preceding sections, the Illinois courts' notion of the MHDDCA's purpose has led to a departure from the MHDDCA's plain language.[272] Such a departure is unnecessary because section 10(a)(1) provides for evidentiary protections against unjustifiable

267. *See supra* notes 92–93 and accompanying text (noting the *Laurent* court's recognition that the language of the MHDDCA expanded the scope of the 10(a)(1) test for admissibility and discussing the Commission's report wherein several other exceptions for disclosure were added to the confidentiality laws).

268. *See supra* note 91 and accompanying text (citing cases that describe the language of the MHDDCA as creating a "formidable challenge" to disclosure).

269. *See supra* Parts III.A.3, B.2 (discussing the second and third prongs of the 10(a)(1) test for admission and the Illinois courts treatment of those provisions).

270. *See supra* note 142 and accompanying text (citing to cases that apply the "at issue" standard); *see also supra* Part IV.A.3 (suggesting how cases, e.g., *Norskog*, *D.C.*, and *Sassali*, may have turned out differently under the "introduction" standard).

271. Rule 403 of the Federal Rules of Evidence governs the exclusion of relevant evidence on the basis of prejudice, confusion, or waste of time. FED. R. EVID. 403. Though the rule does not apply to Illinois state proceedings, a discussion of Rule 403 is instructive as to the application of the rule in Illinois, particularly because Illinois does not have a specific evidentiary rule on point but through common law utilizes the same principles. *See infra* notes 275–77 and accompanying text (discussing the equivalent of the Rule 403 standard in Illinois). Rule 403 provides that: "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." As the Advisory Committee notes indicate, Rule 403 seeks to "balance[] the probative value of and need for evidence against the harm likely to result from its admission." FED. R. EVID. 403 advisory committee's note (citation omitted). Furthermore, the ACN defines "unfair prejudice" as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Id.* Lastly, because the language of Rule 403 requires that the probative value be *substantially* outweighed by any of the aforementioned factors, it is a rule that favors inclusion rather than exclusion. *See* EVIDENCE UNDER THE RULES, *supra* note 29, at 69 ("FRE 403 is cast in language favoring admissibility . . . . Apparently evidence is to be admitted if probative worth and (for instance) the danger of unfair prejudice are in equal balance.").

272. *See supra* Parts III.B, IV.A.3 (analyzing Illinois courts' application of the "at issue" vs. "introduction" standards).

disclosure.[273] However, because the majority of decisions pertaining to the MHDDCA do not discuss these protections,[274] it is necessary to briefly highlight the pertinent provisions of both discovery and relevancy. As the Illinois Supreme Court has recognized, Illinois common law allows a trial court to exclude evidence where its unfair prejudicial effect substantially outweighs its probative value.[275] Another factor that the court is allowed to consider under section 10(a)(1) is the record's relevancy,[276] and during discovery, "relevant" evidence need only be able to lead to evidence that may be admissible at trial.[277] Thus, within the context of mental health records and the MHDDCA, even if the records in the cases cited[278] were allowed to pass through the first prong of section 10(a)(1), relevancy, undue prejudice, or inflammatory effect principles may still serve to block disclosure used solely for improper purposes. Nonetheless, in not reaching the second and third prongs of section 10(a)(1), the courts have not utilized the protections afforded by these prongs—protections that may alleviate the courts' discomfort with disclosure of mental health records.[279]

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273. *See* 740 ILL. COMP. STAT. 110/10 (2008) (allowing for disclosure of records and communications "if and only to the extent" that they are found "relevant, probative, not unduly prejudicial or inflammatory, and otherwise clearly admissible"); *see also supra* Part III.A.2 (discussing sections of and definitions under the MHDDCA).

274. *See supra* Part III.B.2 (noting the paucity of decisions that discuss in depth the application of the second and third prongs of the 10(a)(1) test).

275. Illinois does not have a general statutory codification of evidentiary rules, and accordingly, evidentiary admissibility is predicated on common law. People v. Walker, 812 N.E.2d 339, 350–51 (Ill. 2004) (citation omitted). The court in *Walker* went on to hold that, in agreement with the United States Supreme Court's *Old Chief* decision, "the proper consideration is whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." *Id.* at 351. The court further noted that though Illinois does not have an equivalent to Federal Rule of Evidence 403, the courts have "always provided for" the exclusion of evidence based on its unduly prejudicial nature. *Id.* at 350–51.

276. 740 ILL. COMP. STAT. 110/10(a)(1) (2008).

277. "For purposes of discovery, material is relevant if it is admissible at trial *or can lead to* matters which will be admissible at trial." 4 RICHARD A. MICHAEL, ILLINOIS PRACTICE: CIVIL PROCEDURE BEFORE TRIAL § 34.2, at 158 (1989) (emphasis added) (citations omitted). The Federal Rules of Evidence provides for a similar standard: evidence is relevant if it "ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable . . . than it would be without the evidence." FED. R. EVID. 401; *see also* EVIDENCE UNDER THE RULES, *supra* note 29, at 85 ("[R]elevancy is not sufficiency . . . . [E]ach item need only increase the probability that some consequential point is true.").

278. *See supra* Part III.B.1 (citing to the myriad cases that apply and interpret the MHDDCA's 10(a)(1) provisions).

279. *See supra* note 214 and accompanying text (discussing Illinois courts' discomfort with disclosure under the MHDDCA).

V. PROPOSAL

In contrast to the MHDDCA's plain language, the Illinois courts have predominantly determined that in order for protected mental health records to fall under the section 10(a)(1) exception, the recipient must "affirmatively" place his or her condition "at issue" in the proceeding.[280] This, however, goes beyond section 10(a)(1)'s plain language, and does not account for the philosophical principles behind evidentiary privileges or the need to avoid expansive constructions of truth-inhibiting privileges.[281] As the psychotherapist-patient privilege is a relatively recent addition to privilege law,[282] this Part first underscores the need to address the MHDDCA's philosophical-legal foundation in order to properly interpret its provisions.[283] This Part then suggests that the Illinois courts return to an interpretation based on the statute's plain language by revisiting doctrines of statutory construction.[284] This Part then underscores the need to acknowledge the additional two prongs of the section 10(a)(1) test for admissibility.[285] Lastly, this Part describes the arguments cited by proponents of the psychotherapist-patient privilege, in an effort to remind the reader and the courts of the sensitivity and conscientiousness that must be utilized when determining admissibility under section 10(a)(1).[286]

A. Privileges Are Not Absolute

The distinction between the "at issue" and "introduction" standards in the Illinois courts becomes one of critical importance because of the courts' use of the latter in favor of a broad application of the

280. *See supra* Part III.B.1.a (discussing cases, e.g., *Norskog*, that apply the "at issue" standard of admissibility).

281. *See supra* Part II.A (discussing various legal-philosophical underpinnings and the history of evidentiary privileges).

282. Paul W. Mosher, *Psychotherapist-Patient Privilege: The History and Significance of the United States Supreme Court's Decision in the Case of Jaffee v. Redmond*, *in* CONFIDENTIAL RELATIONSHIPS: PSYCHOANALYTIC, ETHICAL AND LEGAL CONTEXTS 195 (Christine M. Koggel, et al., ed. 2003) ("[U]nlike other well-known privileges . . . the psychotherapist-patient privilege is of relatively recent origin . . . .").

283. *See infra* Part V.A (discussing additional philosophical underpinnings of evidentiary privileges in the context of re-interpreting the MHDDCA).

284. *See infra* Part V.B (suggesting that the Illinois courts reassess their interpretation of section 10(a)(1) in light of traditional doctrines of statutory construction).

285. *See infra* Part V.C (underscoring the need to rely more heavily on the second and third prongs of section 10(a)(1)).

286. *See infra* Part V.D (noting the arguments in support of the psychotherapist-patient privilege so as to highlight the need to maintain congruence with these principles while simultaneously re-interpreting section 10(a)(1)).

privilege.[287] In fact, because the decisions cited in this Comment justify this expansive construction through the social value of the privilege,[288] it is important to highlight the criticism of this privilege[289] to emphasize the need to maintain congruence with the MHDDCA's express language. The need to evaluate these criticisms is compounded by the fact that where a court goes behind a statute's plain language in order to determine the proper interpretation, it must consider both the law's objectives and the "evils sought to be remedied."[290]

Specific to privileges in the medical context, scholars have wondered whether the sanctity afforded to communications between the physician and patient are a per se result of recognizing a privilege.[291] In his *Jaffee* dissent, Justice Scalia questioned the value of the psychotherapist-patient privilege, noting that the likely deterrent effect from rejecting the privilege is minimal particularly considering the fact that few people anticipate litigation when they seek therapy, and psychotherapy itself was "thriving" prior to recognizing the privilege.[292]

This is not to say that such privileges are codified for invalid reasons, but rather to question the broad application of such privileges that occurs without evaluating the pragmatic, underlying effects and purposes.[293] This questioning is particularly important in a situation

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287. *See supra* Part III.B.1.a (citing to cases that decide admissibility under the "at issue" standard).

288. *See supra* note 140 and accompanying text (discussing Illinois courts' reliance on the perceived legislative intent when interpreting and applying the MHDDCA and section 10(a)(1)).

289. *See infra* notes 291–92 and accompanying text (discussing specific criticism of the psychotherapist-patient privilege).

290. *See* People *ex rel.* Birkett v. Dockery, 919 N.E.2d 311, 315 (Ill. 2009) (noting that when engaging in statutory construction, "[the court] may also consider the . . . evils sought to be remedied"); People v. Morris, 848 N.E.2d 1000, 1006 (Ill. 2006) ("It is a well established rule of statutory construction that, in determining the intent of the legislature, a court 'may properly consider not only the language of the statute, but also the reason and necessity for the law [and] the evils sought to be remedied.'") (citation omitted).

291. MCCORMICK ON EVIDENCE, *supra* note 29, at 340. Additional theories have proposed that there is an "alternative basis" for these privileges predicated on the need "to protect the essential privacy of certain significant human relationships." *Id.* (citation omitted). This is in part because it can be difficult to accurately observe the "beneficial consequences claimed for privilege" and many scholars have questioned whether such consequences are in fact materialized outside the scope of the respective litigation at issue. *Id.* at 352; *see also* Jaffee v. Redmond, 518 U.S. 1, 22 (1996) (Scalia, J., dissenting) (inquiring as to the extent to which recognition of the privilege will reduce the deterrent "from seeking psychological counseling . . . because of fear of later disclosure in litigation").

292. *Jaffee*, 518 U.S. at 24 (Scalia, J., dissenting).

293. MCCORMICK ON EVIDENCE, *supra* note 29, at 353 ("[W]hile there is no doubt that some of the statutorily created privileges are soundly based, legislatures have on occasion been unduly influenced by powerful groups seeking the prestige and convenience of a professionally based privilege."). Indeed, "[r]ecently, confidentiality has suffered a number of defeats in clashes with

like the Illinois courts' variable interpretations of section 10(a)(1). If the privilege exists solely to facilitate the psychotherapist-patient relationship and to sanctify any communications made in such a context, the "at issue" standard might be justifiable so long as the statutory language provides for such a standard.[294]

If, however, the purpose is to remedy the "evil"[295] of unnecessary intrusion into personal admissions vulnerable to stigmatization or prejudice, then the privilege must be understood in that context.[296] It appears that the Illinois courts have implicitly adopted the former—emphasizing "at issue" as opposed to recognizing the comprehensiveness of the "introduction" standard and the second and third prongs of section 10(a)(1).[297] The totality of section 10(a)(1)'s language, however, reflects a sophisticated combination of these two prevailing purposes by recognizing that some of the primary deterrents to disclosure are prejudice and inflammatory effect, while simultaneously restricting disclosure to situations where the recipient triggers the exception.[298] But the Illinois courts' utilization of the "at

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other values." *Privileges and Professionals*, *supra* note 47, at 598. Saltzburg cites to various Supreme Court decisions in which common law privileges, such as the spousal privilege, have been "contracted." *Id.* at n.4 (citing Trammel v. United States, 445 U.S. 40 (1980); United States v. Mendoza, 574 F.2d 1373 (5th Cir. 1978); Ryan v. Comm'r of Internal Revenue, 568 F.2d 531 (7th Cir. 1977)).

294. *See, e.g.*, *Privileges and Professionals*, *supra* note 47, at 602 ("[P]rivileges should extend no further than the underlying policies require.").

295. *See supra* note 290 and accompanying text (citing to Illinois Supreme Court decisions that acknowledge the courts' obligation to look to the evil a statute seeks to remedy when engaging in statutory construction).

296. *See supra* note 290 and accompanying text (discussing Illinois cases noting that legislative enactments need to be understood in the context of the evils sought to be remedied by such statututes); *see also supra* notes 68–72 (discussing the *Jaffee* Court's rationale for recognizing the psychotherapist-patient privilege).

297. *See supra* Part III.B.2 (noting a dearth of decisions that analyze admissibility under 10(a)(1) with respect to the second and third prongs required before admission is proper).

298. *See* Mandziara v. Canulli, 701 N.E.2d 127, 133 (Ill. App. Ct. 1998) ("Section 10(a)(1) presents a sophisticated balancing test . . . ."); *see also supra* Parts III.A.3, B.2 (citing to and discussing the requirements of the second and third prongs of the 10(a)(1) test for admissibility). This is further demonstrated by the fact that the confidentiality provision proposed by the then-Governor's commission did not provide for this sophisticated balancing test, but rather allowed the court to limit disclosure only "to the extent that other admissible evidence is sufficient to establish the facts in issue." COMMISSION REPORT, *supra* note 89, at 170. Though this language is also in section 10 of the MHDDCA, 740 ILL. COMP. STAT 110/10(b) (2008), by incorporating the three-pronged test into section 10(a)(1), the legislature clearly intended to create the sophisticated balancing test. *See, e.g.*, People *ex rel*. Birkett v. Dockery, 919 N.E.2d 311, 315 (Ill. 2009) ("[T]he language of the statute is the best indication of th[e legislative] intent."); Lukwinski v. Stone Container Corp., 726 N.E.2d 665, 670 (Ill. App. Ct. 2000) (noting that the first place to look for legislative intent is to "consider the specific wording of the legislation").

issue" standard does not reflect this combination, and accordingly, cannot give full effect to the legislative plain language.[299]

B. Return to the Doctrines of Statutory Construction

Consequent to the Illinois courts' departure from section 10(a)(1)'s plain language,[300] and in light of the continued criticism of the psychotherapist-patient privilege,[301] the Illinois courts should revisit their interpretations of section 10(a)(1) by using the established doctrines for statutory construction.[302] Doctrines of statutory construction guide the way in which a court construes statutes and require the courts to do, among others, three primary things.[303] First, the doctrines require a court to first look at a statute's plain language in order to deduce the legislative intent.[304] Only if the plain language is ambiguous may the court then determine the legislative intent by looking to the legislative history, the purposes behind the statute, and the "evils sought to be remedied."[305] Even if the plain language is ambiguous and the court must go beyond the language to deduce its meaning, the court must not read into the statute additional limitations or conditions and must not apply the statute to maintain only the court's perception of proper public policy.[306]

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299. *See supra* notes 271–79 (noting Illinois court's limited discussions of the second and third prongs of 10(a)(1)).

300. *See supra* Part IV.A.3 (analyzing the Illinois courts' departure from the plain language of the MHDDCA).

301. *See supra* Part V.A (discussing criticisms of the psychotherapist-patient privilege and the need to look at the underlying purpose of the privilege in order to interpret the legislative intent from the statute's plain language).

302. *See infra* notes 303–10 and accompanying text (discussing rules of statutory construction).

303. *See supra* note 7 and accompanying text (noting the requirement that courts interpret and apply statutes according to the doctrines of statutory construction).

304. *People ex rel. Birkett*, 919 N.E.2d at 315 ("[I]n all cases of statutory construction, our goal is to ascertain and give effect to the intent of the legislature, and the language of the statute is the best indication of that intent.") (citation omitted); Quigg v. Walgreen Co., 905 N.E.2d 293, 298 (Ill. App. Ct. 2009) (citing Ultsch v. Ill. Mun. Retirement Fund, 874 N.E.2d 1 (Ill. 2007)) ("[T]he best evidence of the legislature's intent is the statutory language, which must be given its plain and ordinary meaning.").

305. *People ex rel. Birkett*, 919 N.E.2d at 315 (finding that the court "may also consider the purposes behind the statute and the evils sought to be remedied"); *see also* Cinkus v. Vill. of Stickney Mun. Officers Electoral Bd., 886 N.E.2d 1011, 1022 (Ill. 2008) ("Where the meaning of a statute is ambiguous, courts may look beyond the statutory language and consider the purpose of the law and the evils it was intended to remedy."); County of DuPage v. ILRB, 900 N.E.2d 1095, 1101 (Ill. 2008) ("In addition to the statutory language, the court may consider the purpose behind the law and the evils sought to be remedied.").

306. *See* Reda v. Advocate Health Care, 765 N.E.2d 1002, 1010 (Ill. 2002) ("[I]n interpreting a statute, it is never proper for a court to . . . read[] into a statute exceptions, limitations, or

Applying this principle to the MHDDCA, section 10(a)(1) clearly sets forth a standard for admissibility based on an "introduction" of one's condition or aspect of the services rather than on the affirmative placement of the condition into the center of the controversy of the action.[307] Thus, if the Illinois courts seek to interpret the legislative intent, they must do so based on section 10(a)(1)'s plain language, which suggests an intent to avoid inflammatory or unduly prejudicial disclosure,[308] and a broader definition of "introduction" than that seen in previous statutes.[309] This is particularly true given the United States Supreme Court's indication that where a statutory term lacks a specific definition, the court must interpret the term using its "ordinary or natural meaning."[310] As the preceding demonstrates, the "ordinary" or "natural" meaning of "introduction" means merely to put forth, not that it must be an affirmative, express, or direct placement "at issue."[311]

Accordingly, adding the "at issue," "affirmative," or "formidable challenge"[312] requirements goes beyond section 10(a)(1)'s language, and where it does so at the cost of the truth-seeking function, the courts should reassess this definition.[313] Moreover, courts must interpret

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conditions which conflict with the clearly expressed legislative intent."); Murphy v. Mancari's Chrysler Plymouth, Inc., 887 N.E.2d 569, 575 (Ill. App. Ct. 2008) (citing Barthel v. Ill. Cent. Gulf R.R. Co., 384 N.E.2d 323, 327 (Ill. 1978)) ("[C]ourts will read nothing into such statutes by intendment or implication."). The *Murphy* court further noted that it "would not extend such statutes 'any further than what the language of the statute absolutely require[d] by its express terms or by clear implication.'" 887 N.E.2d at 575 (citation omitted). This was particularly true given that the statute at issue in *Murphy* was "in derogation of the common law," and as a result, the *Murphy* court noted the obligation of the courts to limit such statutes to their express language. *Id.* (citation omitted).

307. *See supra* Parts IV.A.1–3 (discussing the plain language-congruent application of section 10(a)(1)).

308. *See supra* Parts III.A.1–3, B.2 (discussing the history of promulgation and the sections of the MHDDCA that enumerate the need to avoid disclosure that is unduly prejudicial or inflammatory).

309. *See supra* note 93 and accompanying text (citing to the *Laurent* court's acknowledgement that the MHDDCA was actually an expansion of previous statutes governing the admissibility of mental health records).

310. FDIC v. Meyer, 510 U.S. 471, 476 (1994) ("In the absence of such a definition [of the term at issue], we construe a statutory term in accordance with its ordinary or natural meaning.") (citation omitted); *see also* Lukwinski v. Stone Container Corp., 726 N.E.2d 665, 671 (Ill. App. Ct. 2000) (citing Gem Elecs. of Monmouth, Inc. v. Dep't of Revenue, 702 N.E.2d 529, 532 (Ill. 1998)) ("[U]nless otherwise defined, statutory terms are to be ascribed their ordinary and popularly understood meanings.").

311. *See supra* note 232 and accompanying text (citing to the Black's Law Dictionary definitions for "introduce into evidence").

312. *See supra* note 91 and accompanying text (citing cases that describe obtaining admission under section 10(a)(1) as a "formidable challenge").

313. *See supra* note 306 and accompanying text (citing to Illinois cases recognizing that it is not the role of the courts to read into statutes any limitations or conditions that go beyond the

statutes to give effect to each clause[314] and allow all clauses to be operative.[315] But the "at issue" standard does not allow for the second and third prongs of section 10(a)(1) to have effect because it preemptively prohibits the court from reaching those prongs.[316] As a result, the "at issue" standard not only departs from section 10(a)(1)'s plain language, but also does not give effect to each prong.[317] Especially because section 10(a)(1) defines basic relevancy to only include "the fact of treatment, the cost of services, and the ultimate diagnosis,"[318] expansively construing section 10(a)(1)'s language to include "at issue" is unnecessary to effectuate the purpose behind the psychotherapist-patient privilege: to induce persons to seek such treatment[319] and to prohibit the unduly prejudicial, inflammatory, or stigmatizing use of mental health records.[320]

C. The Need to Reach the Second and Third Prongs of Section 10(a)(1)

Similarly, the courts should increase their reliance on the second and third prongs of section 10(a)(1) so as to incorporate the section's comprehensive tests and protections.[321] These provisions would preclude the disclosure of mental health records sought to be used solely for inflammatory or unduly prejudicial purposes.[322] Moreover, the *in camera* inspection procedure provided for in section 10(a)(1) specifically exists to maintain the confidentiality of mental health

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scope of the enumerated language).

314. *See* Negonsott v. Samuels, 507 U.S. 99, 106 (1993) (citing Moskal v. United States, 498 U.S. 103, 109–10 (1990)) ("Our reading of the Kansas Act is the only one that gives effect 'to every clause and word of [the] statute.'").

315. *See* Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985) (citing Colautti v. Franklin, 439 U.S. 379, 392 (1979)) (noting that it is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative").

316. *See supra* notes 271–79 (discussing Illinois courts' limited utilization of the second and third prongs of the 10(a)(1) test).

317. *See supra* Part III.A.3 (describing the three prongs of section 10(a)(1).

318. 740 ILL. COMP. STAT. 110/10(a)(1) (2008). A party can overcome this basic restriction on relevancy by showing a "compelling need" for the production of additional records. *Id.*

319. *See* House v. SwedishAmerican Hosp., 564 N.E.2d 922, 926 (Ill. App. Ct. 1990) ("[T]his general prohibition against disclosure of [mental health] information was enacted to . . . provide[] an inducement to seek such treatment.") (citation omitted).

320. *See supra* notes 117–18 and accompanying text (summarizing the requirements of the third prong of section 10(a)(1)).

321. *See supra* Part III.A.3 (discussing sophisticated balancing text of the second and third prongs).

322. *See supra* notes 275–77 and accompanying text (discussing the rules of evidentiary admissibility as they apply in Illinois).

records,[323] and as a result, should be relied upon as a screening mechanism for the propriety of admission. This is particularly true where the United States Supreme Court has noted that, because *in camera* reviews are a "smaller intrusion upon the confidentiality" of a confidential communication, proponents of admission need only, at the outset, meet a smaller evidentiary burden than that required to eventually meet the admission of privileged communications.[324]

As demonstrated in the preceding sections, some of the most highly contested decisions arising out of interpretations of section 10(a)(1) did not analyze the evidentiary admissibility under the second and third prongs,[325] an approach strongly criticized by appellate courts.[326] By utilizing section 10(a)(1)'s numerous provisions, however, the courts can remain cognizant of the underlying nature of the evidentiary privilege while granting deference to the—presumably intentional—three-pronged test for admissibility.[327]

D. Arguments in Support of the Psychotherapist-Patient Privilege

Though this Comment asserts that the Illinois courts must alter the way in which they have interpreted and applied the MHDDCA and section 10(a)(1), this is not to say that the courts should neglect to consider the compelling arguments in support of the psychotherapist-patient privilege. Indeed, it is these arguments that, though in large part

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323. Goldberg v. Davis, 602 N.E.2d 812, 819 (Ill. 1992) (citing Novak v. Rathnam, 478 N.E.2d 1334, 1336 (Ill. 1985)).

324. United States v. Zolin, 491 U.S. 554, 572 (1989) ("[A] lesser evidentiary showing is needed to trigger *in camera* review than is required ultimately to overcome the privilege.") (citation omitted).

325. *See supra* Parts III.B.2, IV.B (noting the limited discussion in the courts of the proper application of the second and third prongs of the 10(a)(1) test).

326. *See* Kyoung Suk Kim v. St. Elizabeth's Hosp. et al., 918 N.E.2d 256, 264 (Ill. App. Ct. 2009) (reversing the dismissal of plaintiff Kim's claims under the MHDDCA and remanding specifically because "the record does not indicate . . . that the circuit court considered . . . the [second and third prong] findings required by section 10(a)(1)"); Chi. Hous. Auth. v. Human Rights Comm'n, 759 N.E.2d 37, 51 (Ill. App. Ct. 2001) ("[S]ection [10(a)(1)] requires that before disclosure, the ALJ must first make several findings concerning the records' relevancy, probative value, undue prejudice, inflammatory content[,] and general admissibility."); Mandziara v. Canulli, 701 N.E.2d 127, 133 (Ill. App. Ct. 1998) (criticizing the lower court because it "never considered admissibility nor did it weigh Mandziara's privacy interests with the 'interests of substantial justice'"); Sassali v. Rockford Mem'l Hosp., 693 N.E.2d 1287, 1290 (Ill. App. Ct. 1998) ("[E]ven if plaintiff had introduced her mental condition as a claim or defense, Rockford has presented no evidence to show that the trial court made the numerous and explicit findings that section 10(a)(1) requires.").

327. *See supra* Parts III.A.2–3 (discussing various provisions of the MHDDCA and section 10(a)(1)).

may result in the Illinois courts' broad application of the privilege, can nonetheless guide the courts through the difficult balancing test.[328]

Proponents of the psychotherapist-patient privilege generally cite to three prevailing principles in support of the privilege: (1) that confidentiality is a "sine qua non" for a healthy therapeutic relationship;[329] (2) that the evidentiary benefit or probative value of disclosure is likely to be minimal;[330] and (3) that fear of a confidentiality breach deters potential recipients from seeking the necessary treatment.[331] When applying section 10(a)(1), it is of the utmost importance that courts maintain congruence with these principles.[332] But congruency need not equal a departure from the statute's plain language, and where section 10(a)(1) expressly allows for precautionary analyses to smoke out improper uses of mental health information, following the plain language of the first prong of section 10(a)(1) will allow the courts to uphold the poignant rationale behind the privilege.

VI. CONCLUSION

The Illinois legislature has deemed the unique nature of the psychotherapist-patient privilege and the confidentiality of such communications important enough to protect with an evidentiary privilege. The application of section 10(a)(1)'s exception to the privilege has varied considerably depending on whether the courts apply the plain language "introduction" standard as opposed to the "at issue"

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328. *See supra* notes 67–72 (citing to the *Jaffee* court's rationale for recognizing the psychotherapist-patient privilege and the Illinois courts relying on the *Jaffee* rationale).

329. Brief for the United States as Amicus Curiae Supporting Respondent at 21, Jaffee v. Redmond, 518 U.S. 1 (1996) (No. 95-266); Brief of the Am. Psychiatric Ass'n et al. as Amici Curiae In Support of Respondents at 16, *Jaffee*, 518 U.S. 1 (No. 95-266) ("The very essence of psychotherapy is confidential personal revelations about matters which the patient is and should be normally reluctant to discuss.").

330. Brief for the United States, *supra* note 329, at 23 (arguing that in certain instances, "the failure to recognize the privilege would not materially assist the fact-finding function of the courts"); Brief for the Am. Psychiatric Ass'n et al., *supra* note 329, at 21–22 ("[T]he evidentiary benefits of breaching therapeutic privacy will very often be weak.").

331. Brief for the United States, *supra* note 329, at 22 ("Uncertainty about whether disclosures will remain confidential may therefore have a substantive effect on the willingness of individuals to seek psychotherapeutic treatment."); Brief for the Am. Psychiatric Ass'n et al., *supra* note 329, at 18 ("The predictable result of rejecting a privilege, then, would be not only to breach one of the important remaining spheres of personal privacy, but also to inflict transformative injury on the psychotherapeutic relationship and hence on mental-health care.").

332. *See supra* note 305 and accompanying text (discussing interpretive canon that where a court finds a statutory term ambiguous, it may look to the evil sought to be remedied by the statute).

standard, two standards with nuanced and cognizable distinctions resulting in broadly different results. Though the latter is most prevalent, its departure from section 10(a)(1)'s plain language requires the courts to reconsider this interpretation particularly because it has precluded disclosure in instances in which the statute's plain language might allow for disclosure.

With the protections afforded by the second and third prongs of section 10(a)(1), recipients and the courts interpreting their rights need not be concerned that irrelevant, unduly prejudicial information will be disclosed only to prejudice the recipient of services. The sophisticated three-pronged balancing test for admissibility specifically allows the courts to foreclose disclosure in such instances. As a result, the Illinois courts should reassess their interpretation of section 10(a)(1) in the light most congruent with traditional doctrines of statutory construction, while relying on the evidentiary protections provided by the latter two prongs. Doing so will allow the courts to effectuate the meaningful purpose behind the privilege while encouraging a conscientious truth-seeking process—the most effective way to maintain compliance with the legislative intent while facilitating the search for the truth.