

CONFIDENTIALITY AND PRIVILEGED COMMUNICATIONS

In the military, only certain communications are recognized as privileged and therefore protected from disclosure. Privileges are narrowly construed. Privilege may be waived by the privilege holder, which occurs when the privilege holder voluntarily discloses or consents to disclosure of any significant part of the matter or communication. For guidance regarding whether a privilege applies in a particular circumstance, commanders should consult their servicing legal office.

Key Takeaways

- » The law recognizes privilege can apply to communications made to clergy, attorneys, mental health care providers, spouses, victim advocates, and, sometimes, communications made for the purpose of drug abuse treatment
- » The Military Rules of Evidence (MRE) do not recognize a medical physician-patient privilege. Disclosure of medical records and communications to physicians are governed by Health Insurance Portability and Accountability Act (HIPAA).
- » Communications to clergy, mental health care providers, victim advocates, and attorneys are privileged only when the communications are made to such a person acting in an official capacity

Communications to Clergy

- A person has a privilege to refuse to disclose and to prevent another from disclosing a privileged communication by the person to a clergyman or to a clergyman's assistant in their capacity as a spiritual advisor, if such communication is made as a formal act of religion or matter of conscience
- The privilege extends to the chaplain's or clergyman's staff

Attorney-Client Privilege

- Privilege applies to all information divulged to an attorney who represents a person, including an Area Defense Counsel, Victims' Counsel or legal assistance attorney, except with respect to some future crimes or frauds and other limited exceptions
- Communications between a commander and Staff Judge Advocate are privileged only when the commander is acting as an agent or official of the Department of the Air Force (DAF) and the commander's interests in no way conflict with those of the DAF
- The privilege extends to non-lawyer members of the attorney's staff

Physician-Patient

- The Military Rules of Evidence do not recognize a physician-patient privilege

Medical Records

- Military medical records are the property of the Department of the Air Force
- Information in the health record is personal to the individual and will be properly safeguarded pursuant to HIPAA
- Commanders or commanders' designees may access members' military medical records, but only to the extent necessary to ensure mission accomplishment

Psychotherapist-Patient Privilege

- A limited privilege exists between patients and psychotherapists
 - Generally, the limited privilege protects only confidential communications which are made to a psychotherapist (or assistant) for the purpose of diagnosis or treatment of the person's mental or emotional condition in cases arising under the Uniform Code of Military Justice (UCMJ). The privilege does not necessarily extend to diagnoses and treatments contained within medical records.
 - Exceptions include: (1) when the patient is dead; (2) the communication is evidence of child abuse or neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse; (3) when the psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient; (4) when the communication clearly contemplates future commission of a fraud or crime; (5) when necessary to ensure safety and security of military personnel or property; or (6) law or regulation imposes a duty to report the information
- Under DAFI 51-201, *Administration of Military Justice*, communications between a patient and a psychotherapist (or assistant) made for purposes of facilitating diagnosis or treatment of the patient's mental or emotional condition are confidential and must be protected against unauthorized disclosure
- A limited privilege also exists under the Limited Privilege Suicide Prevention (LPSP) Program under DAFI 51-201, which applies to communications made after notification of an investigation and placement into the LPSP program

Department of Defense (DoD) Safety Privilege

- The deliberations, opinions, recommendations, and conclusions of safety investigators and any evidence from witnesses and contractors given under a promise of confidentiality are privileged and not releasable outside DoD safety channels
- These investigations are conducted solely for DoD mishap prevention purposes and access is highly restricted even within DoD and the DAF

Victim Advocate-Victim Privilege

- A limited privilege exists between victim advocates and victims of sexual or violent offenses
 - Generally, the limited privilege protects only confidential communications between a victim and a victim advocate or between the victim and DoD Safe Helpline staff, for victims of sexual or violent offenses in a case arising under the UCMJ, made for the purpose of facilitating advice or supportive assistance to the victim
 - Exceptions include, but are not limited to: (1) when the patient is dead; (2) federal/state law or service regulations impose a duty to report; (3) when the victim advocate believes that a victim's mental or emotional condition makes the victim a danger to any person, including the victim; (4) the communication clearly contemplated the future commission of a fraud or crime; (5) when necessary to ensure safety and security of military personnel or property; or (6) disclosure is constitutionally required

Drug/Alcohol Abuse Treatment Patients

- AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program*, grants limited protections for DAF members who voluntarily disclose personal drug use or possession. Those protections do not include any future drug abuse.
 - Such disclosure may not be used as the basis for UCMJ action or for the characterization of service in a discharge proceeding
 - A member must disclose their drug abuse before the use is discovered or the member is placed under investigation. The member may not disclose after he is ordered to give a urine sample as part of the drug testing program in which the results are pending or have been returned as positive.
- Federal law protects medical records pertaining to drug and alcohol abuse

Marital Privilege

- A spouse may elect not to testify against the accused if a valid marriage exists at the time the spouse is to provide testimony (testimonial privilege)
- A spouse may prevent testimony by the other spouse (or ex-spouse) regarding private communications made during the marriage even if the marriage has been dissolved at the time of testimony (marital communications privilege)
- Neither privilege (testimonial or marital communications) applies when one spouse is charged with a crime against the person or property of the other spouse, child, or children of either spouse, if the marriage is a sham as determined by state law, or if the spouses are co-conspirators in a crime

Medical Quality Assurance Privilege

- 10 U.S.C. § 1102 generally restricts access to information emanating from a medical quality assurance program activity. Release is authorized “[t]o an officer, employee, or contractor of the Department of Defense who has a need for such [information] to perform official duties.”

Family Support Center Program

- Family Support Center (FSC) staff should neither state nor imply that confidentiality exists
- The FSC Director will notify the appropriate authority when a DAF member constitutes a potential danger to self, others, or could have an impact on the mission

References

The Privacy Act of 1974, 5 U.S.C. § 552a

Confidentiality of Medical Quality Assurance Records: Qualified Immunity for Participants, 10 U.S.C. § 1102

Confidentiality of Records, 42 U.S.C. § 290dd-2

Rule for Courts-Martial 706 (2019)

Military Rules of Evidence 302, 501–514 (2019)

DoDI 6025.18, *Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule Compliance in DoD Health Care Programs* (13 March 2019)

DoDI 6055.07, *Mishap Notification, Investigation, Reporting, and Record Keeping* (6 June 2011), incorporating Change 1, 31 August 2018

DAFI 36-2710, *Equal Opportunity Program* (18 June 2020), incorporating DAFI36-2710_DAFGM2022-02, 30 September 2022

DAFI 36-3009, *Military and Family Readiness Centers* (4 November 2022)

DAFI 51-201, *Administration of Military Justice* (14 April 2022)

DAFI 91-204, *Safety Investigations and Reporting* (21 March 2021)

AFI 33-332, *Air Force Privacy and Civil Liberties Program* (10 March 2020), Corrective Actions applied on 12 May 2020

AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (18 July 2018), incorporating Change 1, 21 November 2019, Corrective Actions applied on 19 December 2019

AFI 51-110, *Professional Responsibility Program* (11 December 2018)

United States v. Weber Aircraft Corp., 465 U.S. 792 (1984)