STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
SUPREME COURT

IN RE: GRAND JURY SUBPOENA	:	No. 97-423

BRIEF AMICUS CURIAE FOR THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND THE RHODE ISLAND CHAPTER OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS

Michael L. Goldberg, Esq.
David A. Kessler, Esq.
Lewis, Goldberg & Ball, P.C.
1320 Old Chain Bridge Road
Suite 360
McLean, VA 22101-3930
(703) 506-0550

Carolyn I. Polowy
General Counsel, NASW
750 First Street, N.E.
Suite 700
Washington, D.C. 20002-4241
(202) 408-8600

Mortimer C. Newton, Esq.
The Remington Building
91 Friendship Street
Providence, RI 02903-3819
(401) 421-1511

Counsel for the National Association of Social Workers
and its Rhode Island Chapter

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
SUPREME COURT

IN RE: GRAND JURY SUBPOENA	:	No. 97-423

BRIEF AMICUS CURIAE FOR THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND THE RHODE ISLAND CHAPTER OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS

Michael L. Goldberg, Esq.
David A. Kessler, Esq.
Lewis, Goldberg & Ball, P.C.
1320 Old Chain Bridge Road
Suite 360
McLean, VA 22101-3930
(703) 506-0550

Carolyn I. Polowy
General Counsel, NASW
750 First Street, N.E.
Suite 700
Washington, D.C. 20002-4241
(202) 408-8600

Mortimer C. Newton, Esq.
The Remington Building
91 Friendship Street
Providence, RI 02903-3819
(401) 421-1511

Counsel for the National Association of Social Workers
and its Rhode Island Chapter

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES
(continued)

STATUTES

TABLE OF AUTHORITIES
(continued)

STATUTES (continued)

OTHER

TABLE OF AUTHORITIES
(continued)

OTHER (continued)

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
SUPREME COURT

IN RE: GRAND JURY SUBPOENA	:	No. 97-423

BRIEF AMICUS CURIAE FOR THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND THE RHODE ISLAND CHAPTER OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS

INTEREST OF *AMICI*

The National Association of Social Workers (NASW) is a professional membership organization for social workers comprised of approximately One Hundred Fifty-Five Thousand (155,000) clinical social workers, with chapters in every state, the District of Columbia, New York City, Puerto Rico and the Virgin Islands, and an international chapter in Europe. The Rhode Island chapter has one thousand one hundred and fifty (1,150) members, one of whom is Myles Glatter, a licensed clinical social worker who provided psychotherapy treatment to his client, referred to in this litigation as John Doe.[1] Certain records maintained by Mr. Glatter concerning the treatment he rendered are currently being sought by a grand jury sitting in Kent County, Rhode Island, pursuant to a *subpoena duces tecum*.

Created in 1955 by the merger of seven predecessor social work organizations, the purpose of the NASW is to develop and disseminate high standards for the practice of social work, while strengthening the profession as a whole. To further this purpose, the NASW promulgates professional standards and criteria, including: *Standards for the Practice of Clinical Social Work* and *Guidelines for Clinical Social Work Supervision*. It also conducts research, publishes studies of

---

[1]The subpoena issued by the grand jury names one of Mr. Glatter's clients, whose name was not disclosed throughout the lower proceedings in the Superior Court. The NASW will refer to this individual as he was referred to at the Superior Court, as John Doe.

interest to the profession, provides continuing education and enforces the *NASW Code of Ethics*. The NASW also sponsors a voluntary credentialing program to enhance the professional standing of clinical social workers, offering credentials such as: the *NASW Diplomate in Clinical Social Work* and the *Qualified Clinical Social Worker Certificate*.

As the largest professional organization representing clinical social workers in the United States and in the State of Rhode Island, *amici* have a strong interest in the issues presented in this case. Presently, the *Code of Ethics* and *Standards for Practice* adopted and enforced by *amici* and the laws of nearly every state, including Rhode Island, require clinical social workers practicing psychotherapy to maintain the utmost confidentiality of any communications with their clients. Such confidentiality is essential for successful diagnosis and treatment. If the Superior Court's denial of Mr. Glatter's motion to quash the *subpoena duces tecum* issued by the grand jury is permitted to stand, clinical social workers would face the dilemma of being ordered to violate not only their *Code of Ethics* and well-established professional standards that they believe are crucial to their provision of effective mental health care services, but state law as well.

This *amicus* brief focuses primarily on one aspect of the third question presented by the Petition — whether to recognize a privilege for communications between a clinical social worker psychotherapist and his client. The principal function of this brief is to inform the Court about the significant role of clinical social workers in providing mental health care services, and to demonstrate that the successful provision of such services is dependent upon a confidential relationship between social workers and their clients. Without the assurance of this confidential relationship, there will be little incentive for individuals to seek much-needed mental health treatment, thus imperiling the effectiveness of mental health care in the State of Rhode Island.

CONSENT OF PARTIES

This brief as *amici curiae* in support of Petitioner is filed with the consent of the petitioner.

SUMMARY OF ARGUMENT

Clinical social workers are now the predominant providers of mental health care services, as reflected in their broad acceptance as compensable providers by federal and state healthcare programs, as well as by private insurers. Clinical social workers constitute a very high percentage of mental healthcare providers for the overall population, and in particular for less economically-advantaged individuals living in many inner-city and rural areas. Over the past twenty-five years, clinical social work has received widespread recognition as a distinct profession through state licensing and certification regimes, as well as through the growth and development of specific standards of clinical practice and ethical rules. Society recognizes the importance of mental health care, and that confidentiality of the communications between clinical social workers and their clients is critical to successful diagnosis and treatment. The Rhode Island General Assembly codified this public sentiment in a manner similar to that of almost every other state by enacting a social worker/client privilege, R.I. Gen. Laws § 5-39.1-4 (1998), restricting clinical social workers from disclosing information acquired from clients in the course of therapy and treatment, except under very limited circumstances.

Recently, the United States Supreme Court in *Jaffe* v. *Redmond*, 518 U.S. 1, 116 S. Ct. 1923 (1996), exercised its authority under Fed. R. Evid. 501 and recognized a federal privilege protecting confidential communications between psychotherapists and their clients, and extended that privilege to clinical social workers. The Court equated the societal importance of the psychotherapist/client privilege, to the attorney-client and spousal privileges, based upon the inherently sensitive nature of

the communications involved, and found that such communications about mental and emotional issues are in greater need of protection than other types of medical information.

The *amici* therefore urge this Court to overturn the Superior Court's denial of Mr. Glatter's motion to quash the *subpoena duces tecum* issued by the grand jury. Furthermore, this Court should exercise its authority under R.I.R.Evid. 501, and, as did the Supreme Court in *Jaffe*, this Court should recognize formal social worker/client privilege in Rhode Island.

ARGUMENT

I. CLINICAL SOCIAL WORKERS ARE THE PREDOMINANT PROVIDERS OF MENTAL HEALTH CARE, AND CONSTITUTE A FULLY DEVELOPED PROFESSION WHOSE CLIENT COMMUNICATIONS ARE WORTHY OF PROTECTION.

A. Clinical Social Workers Are The Predominant Providers Of Mental Health Care Services, Whose Services Are Required In Certain Health Care Facilities, And Are Recognized As Allowable Costs Under Rhode Island Medical Assistance Program And Private Insurance Carrier Policies.

Although mental health care was once previously provided by a small group of medical doctors specializing in the then newly-established fields of mental illness and emotional disorders, the majority of modern mental health care services are delivered by clinical social workers practicing in various public and private settings. Today, there are at least ten thousand (10,000) more clinical social workers than psychiatrists and psychologists combined.[2] Clinical social workers are the predominant mental health care professionals in facilities serving less privileged clients in state and county mental hospitals, residential treatment centers for emotionally disturbed children, freestanding

---

[2] *See* U.S. Department of Health and Human Services, Center for Mental Health Services, *Mental Health, United States, 1994*, at 107 (1994) (noting that in 1990 study of professional client care staff in mental health organizations and general hospital psychiatric services, there were 53,375 social workers providing mental health services in such facilities, as compared to 18,818 psychiatrists and 22,825 psychologists).

outpatient clinics, and freestanding partial care and multi-service organizations. Clinical social workers are also the predominant, and often exclusive, providers of mental health care services in rural areas, where the per-capita income is lower than the state average.[3]

Rhode Island recognizes the critical importance of social workers to the provision of mental health care to its residents. For example, the Department of Elderly Affairs requires elder day care facilities to provide counseling services through social workers or comparable professional staff, and further requires such facilities to have access to a social worker for a minimum of hours after their client enrollment reaches a certain level.[4] Furthermore, clinical social worker salaries and fees are allowable costs under the Rhode Island Medical Assistance Program.[5] Private health insurance plans also acknowledge the importance of clinical social work services to the provision of mental health care. Insurance contracts almost universally recognize clinical social workers as directly reimbursable providers of treatment for emotional and mental illness and substance abuse. In fact, among health maintenance organizations, clinical social workers constitute the largest percentage of mental health care staff, as compared to psychologists, substance abuse counselors, psychiatric nurses and

---

[3]*See id.* at 129 (noting that 54% of the rural counties in the United States have ambulatory mental health care facilities where clinical social workers are predominant, while only 4.2% have overnight facilities, such as 24-hour care in a hospital setting, residential treatment care and residential supportive care facilities).

[4]C.R.I.R. 09-000-001 at §§ 7(g), 8(a)(5) & 9(d) (1998) (requiring that a social worker, or other professional staff members if a social worker is not available, provide individual and group counseling services to participants and their families; if an elder day care center's daily enrollment is 24 or more participants, the provider must have access to a social worker who will be on site or available for a minimum of 20 scheduled hours per week; and defining the credentials required to qualify as a social worker and the responsibilities of a social worker in an elder day care center).

[5]*See* R.I. Gen. Laws § 40-8-19(b)(1)(v) (1998) (stating that allowable costs to be paid by the Rhode Island medical assistance program for service provided to program beneficiaries in nursing facilities include reasonable social worker salaries and fees); C.R.I.R. 15-040-015 (1998) (same).

psychiatrists.[6] Additionally, Employee Assistance Plans (EAPs), which are a relatively new employee benefit to assist employees in coping with substance abuse, mental illness, stress and family problems, tend to rely principally on clinical social workers for delivery of mental health care services.[7]

B. Clinical Social Workers Must Meet Rigorous Education And Training Requirements, Must Be Licensed By The Rhode Island Department Of Health, And Are Subject To Stringent Peer Controls And Ethical Rules.

Clinical social workers are legally recognized professionals educated and trained in the diagnosis and treatment of mental and emotional illness. The mental health care counseling that they provide is similar to that rendered by psychiatrists and clinical psychologists.[8] At present, approximately one hundred and seventeen (117) accredited master's level programs are offered by colleges and universities throughout the United States to prepare students for clinical social work practice and other career options. The typical clinical social worker has completed graduate courses in cognitive, psychological and social development, major theoretical explanations of personality development, and at least nine hundred (900) hours of clinical training before graduation. While many of the fifty-three (53) doctoral level programs are primarily oriented towards careers in research and teaching, there are a growing number of clinical doctorate programs that prepare post-master's

---

[6]*See* Interstudy Center for Managed Care Research, *National Survey of Mental Health, Alcohol, and Drug Abuse Treatment in HMOs: 1989 Chartbook* (1992) (30% — clinical social workers; 22% psychologists; 22% substance abuse counselors; 12% psychiatric nurses; and 15% psychiatrists).

[7]*See* Gibelman, WHAT SOCIAL WORKERS DO 42 (1995).

[8]*See Developments In the Law — Privileged Communication: IV. Medical and Counseling Privileges*, 98 Harv. L. Rev. 1530, 1550 (1985) (stating that "[s]ocial workers often offer the same services as psychotherapists, and are currently providing more direct mental health service than are psychologists and psychotherapists. . . . The functional overlap is complete; the services offered by other counselors constitute a subset of those offered by psychotherapists and are therefore indistinguishable from the services of psychotherapists.").

degree students for advanced levels of clinical social work practice.[9]

Pursuant to the Rhode Island Social Worker License Act, R.I. Gen. Laws §§ 5-30.1-1, *et seq.* (1998), Rhode Island mandates certain minimum levels of education, experience, and supervision for individuals seeking to practice clinical social work.[10] An applicant for certification as a "licensed clinical social worker" must possess a doctorate or masters degree from a school of social work accredited by the Council on Social Work Education, and must either satisfactorily complete a license exam or possess a comparable license, certification, or registration from another state or territory of the United States that imposes licensing requirements similar to those of Rhode Island.[11] An applicant for certification as a "licensed independent clinical social worker" must already be a "licensed clinical social worker", and must possess twenty-four (24) months of experience,[12] under appropriate

---

[9]*See* Frumkin & Lloyd, *Social Work Education*, in 2 *Encyclopedia of Social Work* 2238, 2242 (19th ed. 1995). Clinical social workers may also attain certification in advanced clinical practice through the *Diplomate in Clinical Social Work* offered by *Amicus* NASW.

[10]R.I. Gen. Laws § 5-39.1-2 (2) (1998) defines "clinical social work practice" as:
[T]he professional application of social work theories, methods, and values in the diagnosis, assessment, and treatment of cognitive, affective, and behavioral disorders arising from physical, environmental, or emotional conditions. Clinical social work services shall include but shall not be limited to diagnosis; assessment; evaluation, psychotherapy and counseling for individuals, couples, families, and groups; client-centered advocacy; consultation; and supervision. Clinical social work services shall not include psychological testing and nothing in this chapter shall be construed permitting social workers to practice psychology.

[11]R.I. Gen. Laws § 5-39.1-8(b) (1998).

[12]R.I. Gen. Laws § 5-39.1-2(7) (1998) defines "experience" as:
Three thousand (3,000) hours of post-master's practice of clinical social work during a twenty-four (24) to seventy-two (72) month period of time immediately preceding the date of application for licensure; one thousand five hundred (1,500) hours must consist of providing clinical social work services directly to clients.

supervision,[13] must have fulfilled all continuing education requirements for the license, and must either satisfactorily complete a license exam or possess a comparable license, certification, or registration from another state or territory of the United States that imposes licensing requirements similar to those of Rhode Island.[14] Additionally, an applicant for either certification must meet at least seven (7) other requirements, one of which is the absence of any NASW sanction for violating the *Code of Ethics* or comparable state sanction, or otherwise proving to the Board of Social Work Examiners[15] that such sanction will not impair the applicant's ability to practice clinical social work.[16] The Board

---

[13]R.I. Gen. Laws § 5-39.1-2(8) (1998) defines "supervision" as:
"Face-to-face contact with a licensed independent clinical social worker for the purpose of apprising the supervisor of the diagnosis, assessment, and treatment of each client; receiving oversight and guidance from the supervisor in the delivery of clinical social work services to each client; and being evaluated by the supervisor. This contact must consist of: (i) a minimum of two (2) hours of supervision every two (2) weeks, and (ii) a minimum of one hour of supervision per twenty (20) hours of direct contact with clients whether or not the number of hours of supervision required for a two (2) week period have been met, and (iii) one-to-one contact with the supervisor at least seventy-five percent (75%) of the time with group supervision of no more than ten (10) supervisees during the balance of the time, and (iv) supervision by an individual other than the applicant's parents; spouse, former spouse; siblings; children; employees; or anyone share the same household or any romantic, domestic, or familial relationship.

[14]R.I. Gen. Laws § 5-39.1-8(c) (1998).

[15]R.I. Gen. Laws § 5-39.1-6 (1998) (noting that the governor appoints the seven (7) members to the Board of Social Work Examiners, within the Department of Health, for terms of three (3) years, with at least one member also being a member of the NASW).

[16]R.I. Gen. Laws § 5-39.1-8(d) (1998). The seven (7) requirements are: (1) applicant is at least twenty-one (21) years; (2) applicant merits the public trust; (3) applicant is a United States citizen or other legal resident; (4) applicant has not been convicted of a felony, or otherwise proves to to the Board of Social Work Examiners that such conviction will not impair the applicant's ability to practice clinical social work; (5) applicant has not been sanctioned by the NASW for violating the *Code of Ethics* or by the state, or otherwise proves to the Board of Social Work Examiners that such sanction will not impair the applicant's ability to practice clinical social work; (6) applicant has not been declared mentally incompetent by any court, and if so, there has been a subsequent action

of Social Work Examiners may recommend to the Director of the Department of Health after a hearing that a license not be granted, or that one be suspended, revoked, conditioned, limited, qualified, or restricted based on a variety of findings, including that the applicant or licensee has failed to maintain confidentiality, except as otherwise required by law.[17]

Through its *Code of Ethics*, the NASW imposes strict requirements concerning the confidentiality of information received by clinical social workers from their clients. Section 1.07 of the *Code of Ethics*,[18] provides eighteen (18) detailed provisions, ranging from the general admonition

---

declaring the applicant to be competent; and (7) applicant is free from the use of any controlled substance or alcohol to the extent that the use impairs the applicant's ability to practice clinical social work.

[17]R.I. Gen. Laws § 5-39.1-10 (1998). *See also* R.I. Gen. Laws § 5-39.1-13 (outlining disciplinary sanctions that may be recommended by the Board of Social Work Examiners to the Director of the Department of Health). Furthermore, anyone subject to discipline for violating the provisions of R.I. Gen. Laws § 5-39.1-10, is guilty of a misdemeanor, punishable by a fine of not more than One Thousand Dollars ($1,000). *Id.*

[18]1.07 Privacy and Confidentiality

(a) Social workers should respect clients' right to privacy. Social workers should not solicit private information from clients unless it is essential to providing service or conducting social work evaluation or research. Once private information is shared, standards of confidentiality apply.

(b) Social workers may disclose confidential information when appropriate with a valid consent from a client, or a person legally authorized to consent on behalf of a client.

(c) Social workers should protect the confidentiality of all information obtained in the course of professional service, except for compelling professional reasons. The general expectation that social workers will keep information confidential does not apply when disclosure is necessary to prevent serious, foreseeable, and imminent harm to a client or other identifiable person or when laws or regulations require disclosure without a client's consent. In all instances, social workers should disclose the least amount of confidential information necessary to achieve the desired purpose; only information that is directly relevant to the purpose which the disclosure is made should be revealed.

(d) Social workers should inform clients, to the extent possible, about the disclosure of confidential information and the potential consequences and, when feasible, before the disclosure is made. This applies whether social workers disclose confidential information as a result of a legal requirement or based on client consent.

(e) Social workers should discuss with clients and other interested parties the nature of confidentiality and limitations of clients' right to confidentiality. Social workers should review with

clients circumstances where confidential information may be requested and where disclosure of confidential information may be legally required. This discussion should occur as soon as possible in the social worker-client relationship and as needed throughout the course of the relationship.

(f) When social workers provide counseling services to families, couples, or groups, social workers should seek agreement among the parties involved concerning each individual's right to confidentiality and obligation to preserve the confidentiality of information shared by others. Social workers should inform participants in family, couples, or group counseling that social workers cannot guarantee that all participants will honor such agreements.

(g) Social workers should inform clients involved in family, couples, marital, or group counseling of the social worker's, employer's, and/or agency's policy concerning the social worker's disclosure of confidential information among the parties involved in the counseling.

(h) Social workers should not disclose confidential information to third party payors, unless client's have authorized such disclosure.

(i) Social workers should not discuss confidential information in any setting unless privacy can be assured. Social workers should not discuss confidential information in public or semi-public areas (such as hallways, waiting rooms, elevators, and restaurants).

(j) Social workers should protect the confidentiality of clients during legal proceedings to the extent permitted by law. When a court of law or other legally authorized body orders social workers to disclose confidential or privileged information without a client's consent and such disclosure could cause harm to the client, social workers should request that the court withdraw or limit the order as narrowly as possible and/or maintain the records under seal, unavailable for public inspection.

(k) Social workers should protect the confidentiality of clients when responding to requests from members of the media.

(l) Social workers should protect the confidentiality of clients' written and electronic records and other sensitive information. Social workers should take reasonable steps to ensure that clients' records are stored in a secure location and that clients' records are not available to others who are not authorized to have access.

(m) Social workers should take precautions to ensure and maintain the confidentiality of information transmitted to other parties through the use of computers, electronic mail, facsimile machines, telephones and telephone answering machines, and other electronic or computer technology. Disclosure of identifying information should be avoided whenever possible.

(n) Social workers should transfer or dispose of clients' records in a manner that protects clients' confidentiality and is consistent with state statutes governing records and social work licensure.

(o) Social workers should take reasonable precautions to protect client confidentiality in the event of the social worker's termination of practice, incapacitation, or death.

(p) Social workers should not disclose identifying information when discussing clients for teaching or training purposes, unless the client has consented to disclosure of confidential information.

(q) Social workers should not disclose identifying information when discussing clients with consultants, unless the client has consented to disclosure of confidential information or there is a compelling need for such disclosure.

that clinical social workers should respect their clients' rights to privacy,[19] to specific precautions regarding the transmission of patient information through e-mail, fax machines and telephones.[20] As a precursor to consultation and the disclosure of confidential information, a clinical social worker has the responsibility of informing a client of any limitations on confidentiality.[21] Similar to many state statutes establishing a social worker/client privilege, including Rhode Island's, Section 1.07 provides that under certain circumstances clinical social workers may make limited disclosure of confidential information,[22] namely: when the client gives valid consent,[23] to prevent serious, foreseeable and imminent harm to the client or another identifiable person,[24] or when "laws or regulations require disclosure without a client's consent."[25] Clinical social workers who violate the provisions of Section

---

(r) Social workers should protect the confidentiality of deceased clients consistent with the preceding standards.

[19]*Id.* § 1.07(a).

[20]*Id.* § 1.07(m).

[21]*Id.* § 1.07(d).

[22]*Id.* § 1.07(c) (explaining that "[i]n all instances, social workers should disclose the least amount of confidential information necessary to achieve the desired purpose; only information that is directly relevant to the purpose which the disclosure is made should be revealed.").

[23]*Id.* § 1.07(b).

[24]*Id.* § 1.07(c).

[25]*Id.* For example, *see* R.I. Gen. Laws § 40-11-3 (1998) (requiring "[a]ny person who has reasonable cause to know or suspect that any child has been abused or neglected . . . or has been a victim of sexual abuse by another child shall, within twenty-four (24) hours, transfer that information to the department for children and their families or its agent who shall cause the report to be investigated immediately."). No statutory or decisional law discusses the scope of the information that must be disclosed to meet the reporting requirements of section 40-11-3. As discussed below, the General Assembly has recognized adherence to the NASW *Code of Ethics*, including its confidentiality requirements, as a requirement of its regulatory scheme for clinical social workers. Reciprocally, section 1.07 of the *Code of Ethics* incorporates the abuse/neglect reporting

1.07 are subject to both disciplinary action and liability for professional malpractice.

By including NASW disciplinary sanctions in Rhode Island's clinical social worker licensing scheme, the General Assembly recognized and acknowledged the profession's self-regulatory goals, including the utmost preservation of client confidentiality. These goals are as important as those pursued by other professions, such as the legal profession, and thus they should be respected and encouraged to the same extent by the recognition of a social worker/client privilege.[26]

II. THE PROTECTION OF COMMUNICATIONS BETWEEN PSYCHOTHERAPISTS AND THEIR PATIENTS IS ESSENTIAL FOR SUCCESSFUL TREATMENT.

In establishing new evidentiary privileges at common law, the primary question is whether the need for the privilege outweighs the cost of withholding the privileged information from the litigation process. In his influential treatise, Dean Wigmore delineated four (4) requirements for recognizing common law evidentiary privileges:

(1) The communications must originate in a confidence that they will not be disclosed.

---

requirements of R.I. Gen. Laws § 40-11-3. Section 1.07(c) requires that a clinical social worker "disclose the least amount of confidential information necessary to achieve the desired purpose; only information that is directly relevant to the purpose which the disclosure is made should be revealed." Therefore, the information required to be reported pursuant to section 40-11-3 should be limited to objective information, (i.e. name of the client, type of abuse, age/sex of victim) so as not to conflict with a clinical social worker's duty to disclose the least amount of confidential information.

[26]In *Swidler & Berlin* v. *United States*, 118 S. Ct. 2081, 2086 (1998), the United States Supreme Court observed that:

> Many attorneys act as counselors on personal and family matters, where, in the course of obtaining the desired advice, confidences about family members or financial problems must be revealed in order to assure sound legal advice. The same is true of owners of small businesses who may regularly consult their attorneys about a variety of problems arising in the course of the business. These confidences may not come close to any sort of admission of criminal wrongdoing, but nonetheless be matters which the client would not wish divulged.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties.
(3) The relationship must be one that in the opinion of the community ought to be seduously fostered.
(4) The injury that would inure to the relationship by the disclosure must be greater than the benefit thereby gained for the correct disposal of litigation.

8 J. Wigmore, *Evidence* § 2285, at 527 (McNaughton rev. 1961).

The social worker/client privilege satisfies Dean Wigmore's first criteria, that communications during treatment sessions with social workers are made "in a confidence that they will not be disclosed." It is well documented that clients make certain communications during treatment sessions expecting that such communications will remain confidential.[27] This expectation is based in part on the ethical responsibilities of clinical social workers to retain their clients' confidences.[28] Furthermore, many states, including Rhode Island, provide causes of action for the wrongful disclosure of confidential medical information.[29]

---

[27]*See, e.g.*, John M. McGuire et al., *The Adult Client's Conception of Confidentiality in the Therapeutic Relationship*, 16 Prof. Psychol.: Res. & Prac. 375, 380 (1985) (survey results indicate that patients "not only value confidentiality in the therapy relationship but that they also expect it."); David J. Miller & Mark H. Thelen, *Knowledge and Beliefs About Confidentiality in Psychotherapy*, 17 Prof. Psychol.: Res. & Prac. 15, 18 (1986) (majority of patients perceive confidentiality as an "all -encompassing, superordinate mandate for the profession of psychology."); Donald Scmid et al., *Confidentiality in Psychiatry: A Study of the Patient's View*, 34 Hosp. & Community Psychiatry 353, 354 (1983) (noting that patients in sample surveyed "believed that confidentiality was an important concomitant of their care.").

[28]*See* Daniel W. Shuman and Myron S. Wiener, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. Rev. 893, 920 (1982). As noted above, social workers are obligated by NASW Code of Ethics § 1.07 not to divulge information disclosed to them by their patients.

[29]*See Washburn* v. *Rite Aid Corp.*, 695 A.2d 495 (R.I. 1997) (finding pharmacy violated privacy rights of customer by disclosing prescription information to her husband in divorce proceeding, citing R.I. Gen. Laws §§ 5-37.3-4 & 9-1-28.1).

The social worker/client privilege also satisfies Dean Wigmore's second requirement, that "confidentiality [is] essential to the full and satisfactory maintenance of the relationship . . . ." between social workers and their patients. Unlike patients of medical doctors with physical ailments, which those doctors diagnose and treat using objective tests and physical examinations, the information necessary for clinical social workers to diagnose and treat mental illnesses successfully come from the clients themselves, and is disclosed only at the clients' own pace.[30] It is essential to effective diagnosis and treatment that clinical social workers create an atmosphere of confidence and trust, allaying any fears that the information disclosed to them will be subsequently disclosed to others. The basis for such fears is that the information disclosed to clinical social workers is often of a highly personal nature, and in many cases clients would not disclose such information even to the closest members of their families. Clinical social worker clients commonly discuss a wide variety of personal concerns with their therapists, such as: problems with spouses, significant others or family members; questions about sexual orientation or sexual relations; and difficulties with employers, co-workers, friends or teachers. In doing so, clients often discuss not only themselves and their intimate feelings about such matters, but also those of others with whom their lives are intertwined. The disclosure of such matters could therefore have severe consequences on the individual client and others, whether in the form of divorce, permanent damage to relationships with family or friends, loss of employment, or any number of other adverse consequences flowing from such a serious breach of privacy. The

---

[30]*See Jaffee* v. *Redmond*, 518 U.S. 1, 10, 116 S. Ct. 1923, 1928-1929 (1996) (explaining that a psychiatrist's ability to help her patients "is completely dependent upon [the patient's] willingness and ability to talk freely.") (*quoting* Advisory Committee's Notes to Proposed Rules 56 F.R.D. 183, 242 (1972)). *See also* Note, *"I'm Your Therapist, You Can Tell Me Anything": The Supreme Court Confirms the Psychotherapist-Patient Privilege in Jaffee v. Redmond*, 47 DEPAUL L. REV. 701, 716 (1998) (noting that "the psychotherapist-patient relationship is one that requires a two-way open communication to function properly.")

importance of confidentiality to the relationship between clinical social workers and their clients is thus more akin to that existing between attorneys and their clients, rather than that between physicians and their patients.[31]

As to Dean Wigmore's third requirement, that "the relationship [is] one that . . . the community" believes should be fostered, one need look no further than the role that clinical social workers occupy in delivering mental health care services. As discussed above, clinical social workers supply the majority of such services, are required in certain elder care facilities, their costs are reimbursable under the Rhode Island Medical Assistance Program, are required to be licensed and are highly regulated by the State. Furthermore, beyond the general interest that society has in the relief of everyday mental and emotional distress, the mental health care services offered by clinical social workers assist in minimizing the violent or self-destructive behavior exhibited by those considered dangerous by society due to their mental illness. *See In re Zuniga*, 714 F.2d 632, 639 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983).

The social worker/client privilege also satisfies Dean Wigmore's final requirement, that the "injury that would inure to the relation by the disclosure [is] greater than the benefit thereby gained for the correct disposal of litigation." Rhode Island, as well as almost every other state, has adopted some type of social worker/client privilege, demonstrating that society places a far greater value on protecting the information disclosed during treatment sessions, than allowing its disclosure during the

---

[31] *See Sarko* v. *Penn-Del Director Co.*, 170 F.R.D. 127, 130 (E.D. Pa. 1997) (analogizing the policy considerations supporting recognition of a psychotherapist/patient privilege to those underlying the attorney/client privilege); *Vanderbilt* v. *Town of Chilmark*, 174 F.R.D. 225, 229 (D. Mass. 1997) (explaining that "[t]he attorney-client privilege and the psychotherapist-patient privilege are both rooted in the imperative need for confidence and trust. It is reasonable, therefore, to suggest that the scope of the two privileges should be similar.") (internal quotations and citations omitted). *See also supra* note 26.

litigation process. Furthermore, recognizing a social worker/client privilege would have little adverse effect on the search for the truth and the proper administration of justice. Communications made to clinical social workers during treatment sessions are inherently unreliable evidence, as they often represent the way clients subjectively experienced an event, i.e. feelings, emotions, rather than detached and objective accounts of such events.[32] The compelled disclosure of such subjective perceptions will have a minimal probative value as compared to the damage such disclosure will have on the relationship between clinical social workers and their clients.

Additionally, without a social worker/client privilege, clients who believe that they have any chance of participating in legal proceedings would inevitably have second thoughts about seeking treatment. Even if they overcome their reluctance, such clients would carefully guard what they say during treatment sessions to avoid any repercussions from their statements being taken out of context.[33] At the same time, clinical social workers would have to weigh what information they put in their records, and whether they should sacrifice the degree of completeness counseled by their professional judgment to protect their clients from the risks of disclosure. The circumstances of the

---

[32]*See* Note, *supra* note 30, at 732-33 (explaining that "the psychotherapist is not likely to be a reliable and primary source of solid objective evidence. By contrast, the process of psychotherapy is concerned with purely subjective perceptions, feelings, concerns, and inner problems, bearing little resemblance or relationship to reality."); Robert M. Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 Wayne L. Rev. 609, 631 (1964).

[33]*See* Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 Yale L.J. 1226, 1255 (1962) (observing that 71% of people surveyed by the author would be less likely to make full disclosure to a psychotherapist if the therapist had a legal obligation to disclose confidential information if asked to do so by an attorney or judge). *See also* Note, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of Tarasoff*, 31 Stan. L. Rev. 165, 183 (1978) (noting that majority of therapists surveyed by the author "thought that patients will withhold information important to treatment if they believe the therapist may breach confidentiality.").

present case illustrate this very dilemma, as the grand jury is seeking Mr. Glatter's notes, which it suspects contain information relevant to its decision whether to indict Mr. Glatter's client. Absent a social worker/client privilege, the very material that the grand jury seeks would likely not exist.

The predictable result of rejecting a privilege would be to overwhelm completely the ability of clinical social workers to explore with their clients various personal issues that are critical for successful diagnosis and treatment.[34] The attendant consequence would be to diminish, perhaps even eliminate, the effectiveness of clinical social workers in the treatment of mental illness in Rhode Island, and to deny society at large this beneficial therapy option.

III. THE UNITED STATES SUPREME COURT RECOGNIZED A FEDERAL COMMON LAW PSYCHOTHERAPIST/PATIENT PRIVILEGE, AND EXTENDED THAT PRIVILEGE TO CLINICAL SOCIAL WORKERS.

In 1996, the United States Supreme Court in *Jaffee* v. *Redmond*, 518 U.S. 1, 116 S. Ct. 1923 (1996), held that in the course of psychotherapy, confidential communications between psychotherapists and their patients, including licensed clinical social workers practicing psychotherapy, are privileged from compelled disclosure under Rule 501 of the Federal Rules of Evidence. In *Jaffee*, a police officer had responded to a call involving a fight in progress, and during the ensuing melee, fatally shot one of the participants. The officer later participated in numerous counseling sessions with a state-licensed clinical social worker. The administrator of the decedent's estate brought an action for damages against the officer and the village that employed her, alleged that she had violated the constitutional rights of the decedent by using excessive force, and sought

---

[34]For example, *see* Howard Roback, et al., *Guarding Confidentiality In Clinical Groups: The Therapists Dilemma*, Int'l. J. Group Psychotherapy 42:81-103 (1992) (noting reluctance by psychotherapists to fully inform patients of the limits of confidentiality for fear that such disclosure might discourage persons from entering treatment and might alter the therapeutic dialogue by making patients less likely to reveal important personal information.).

discovery for use in cross-examination of the notes taken by the licensed social worker who treated her.

In beginning its analysis, the Court explained that Fed. R. Evid. 501 authorizes federal courts to define new privileges by interpreting "common law principles . . . in the light of reason and experience." *Jaffee* v. *Redmond*, 518 U.S. at 8, 116 S. Ct. at 1927 (quoting *Wolfe* v. *United States*, 291 U.S. 7, 12 (1934)). It noted that "[e]xceptions from the general rule disfavoring testimonial privileges may be justified [] by a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'" *Jaffee*, 518 U.S. at 9, 116 S. Ct. at 1928 (*quoting Trammel* v. *United States*, 445 U.S. 40, 50 (1980)) (internal citations and quotations omitted). Consequently, the Court considered whether "a privilege protecting confidential communications between a psychotherapist and her patient 'promotes sufficiently important interests to outweigh the need for probative evidence . . .'" *Jaffee*, 518 U.S. at 9-10, 116 S. Ct. at 1928.

In answering this inquiry in the affirmative, the *Jaffee* Court observed that "[l]ike the spousal and attorney-client privileges, the psychotherapist-patient privilege is 'rooted in the imperative need for confidence and trust.'" *Jaffee*, 518 U.S. at 10, 116 S. Ct. 1928 (*quoting Trammel*, 445 U.S. at 51). Yet in making this comparison, it was quick to distinguish psychotherapy from routine medical treatment:

> Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful

treatment.

Id. Instead, the *Jaffee* Court found that the psychotherapist/patient privilege is more akin to the attorney/client and spousal privileges, explaining that each serves a unique "public end":

> [T]he purpose of the attorney-client privilege is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. And the spousal privilege, . . . is justified because it furthers the important public interest in marital harmony, . . . The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.

Jaffee, 518 U.S. at 11, 116 S. Ct. at 1929 (internal citations and quotations omitted).

The *Jaffee* Court further pointed out that any evidentiary benefit from the denial of a psychotherapist/patient privilege would be modest, with an attendant chilling effect on the very evidence sought through the discovery of the conversations and notes between psychotherapists and their patients. That is, any desirable evidence, such as admissions against interest, would never come into being because patients would not make such admissions with the knowledge that they could be used against them. *Jaffee*, 518 U.S. at 11-12, 116 S. Ct. 1929.

The *Jaffee* Court also considered whether there should be a balancing component in the federal common-law psychotherapist/patient privilege, allowing a trial judge discretion in balancing "the relative importance of the patient's interest in privacy and the evidentiary need for disclosure . . . ." *Jaffee*, 518 U.S. at 17-18, 116 S. Ct. at 1932. The Court concluded that to do so would "eviscerate the effectiveness of the privilege, . . . [because] if the purpose of the privilege is to be served, the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected.'" *Id.* (*quoting Upjohn Co.* v. *United States*,

449 U.S. 383, 393 (1981)). It did point out, however, that while it would not speculate as to future developments in the psychotherapist/patient privilege, the privilege must give way in certain situations, such as a serious threat of harm to the patient or to others. *Jaffee*, 518 U.S. at 18, 116 S. Ct. at 1932. These "safety valves" are already part of Rhode Island's statute recognizing a social worker/client privilege, as they are in the laws of most states, and are explicit exceptions to the provisions concerning client confidentiality found in Section 1.07 of the *NASW Code of Ethics*. Each of these exceptions already, to a greater or lesser extent, undermines the value of the privilege. But the impact of such exceptions will be far less severe than a regime of general balancing, which would create uncertainty in every case.[35] "Balancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application." *Swidler & Berlin*, 118 S. Ct. at 2087. The *Swidler* Court, thus, rejected the use of a balancing test in defining the contours of the attorney/client privilege.

IV. THIS COURT HAS THE AUTHORITY TO RECOGNIZE A SOCIAL WORKER/CLIENT PRIVILEGE, AND DOING SO WILL NOT CONFLICT WITH THIS COURT'S PRIOR DECISIONS ON THE LAW OF PRIVILEGE.

The necessity of recognizing a social worker/client privilege to protect psychotherapy communications is demonstrated by the actions of the Rhode Island General Assembly in enacting a social worker/client privilege, the actions of other state legislatures in recognizing psychotherapy privilege and some form of social worker/client privilege, and in the decision of the United States

---

[35]*See Vanderbilt*, 174 F.R.D. at 229 (explaining that "[a]fter Jaffee, a court cannot force disclosure of [communications with a psychotherapist] solely because it may be extremely useful to the finder of fact. Giving weight to the usefulness of the evidence as a factor in a decision regarding the scope of the privilege would be a balancing exercise that was barred by Jaffee.") (citing *Sax* v. *Sax*, 136 F.R.D. 541, 542 (D. Mass. 1991) (explaining that in the attorney-client context, "the test is not whether the information which is the subject of the privilege is 'relevant', the information is usually highly relevant.")).

Supreme Court in *Jaffee* v. *Redmond* in recognizing a federal common law psychotherapist/patient privilege, and extending that privilege to clinical social workers. This Court has the authority to recognize a social worker/client privilege under R.I.R. Evid. 501, and doing so would not conflict with this Court's prior decisions on the law of privilege.

As this Court pointed out in several of its prior decisions,[36] only it has the authority to remove various types of evidence from judicial fact-finding. Thus, while the General Assembly took the initiative in recognizing the need for a social worker/client privilege, this Court has the authority to create such a privilege, and indeed should, even if it ultimately determines that the actions of the General Assembly were unconstitutional.

Recognizing a common law social worker/client privilege will not conflict with this Court's prior decisions regarding the discovery of psychotherapy or medical records. First, there is no federal or state constitutional imperative inherent in a grand jury *subpoena duces tecum* that requires the disclosure of social worker client records. In *State* v. *Khali Kholi*, 672 A.2d 429 (R.I. 1996), this Court addressed whether the notes of a licensed psychologist who had counseled a sexual abuse victim were improperly withheld from discovery by the trial court. The trial court justice had reviewed the notes *in camera* for relevancy and determined that only four (4) pages were relevant and therefore discoverable. The defendant argued that he was entitled to full access to the notes, as the victim had waived the psychotherapist/patient privilege by testifying about her discussions of the sexual abuse with her psychologist. This Court, while pointing out that "confidential health care

---

[36] *Bartlett* v. *Danti*, 503 A.2d 515 (R.I. 1986); *State* v. *Almonte*, 644 A.2d 295 (R.I. 1994); *In re: John Doe Grand Jury Proceedings*, 717 A.2d 1129, 1998 R.I. LEXIS 274, *1 (R.I. 1998).

information" was protected under R.I. Gen. Laws § 5-37.3-6(a),[37] explained that:

> Despite the importance of confidentiality we have also recognized that the Sixth Amendment to the United States Constitution, through the Fourteenth Amendment, and article 1, section 10, of the Rhode Island Constitution guarantee a defendant the right to an effective cross-examination in all criminal matters.

Khali Kholi, 672 A.2d at 436 (citing cases). Faced with the defendant's right to confrontation under the federal and state constitutions, this Court nonetheless decided that the trial justice's *in camera* review of the notes struck the requisite balance between that right and the victim's right to confidentiality. *Id.* at 437. What sets *Khali Kholi* apart from the instant case however, is that in the present case, no defendant is asserting a Sixth Amendment right to confrontation against John Doe. Quite the contrary, the grand jury that issued the *subpoena duces tecum* for Mr. Glatter's notes is seeking to indict Mr. Doe. Thus, while this Court has recognized the need to accommodate a defendant's right to an effective cross-examination and defense, no such right is implicated in the instant case.

While the "dual functions" of the grand jury are to determine whether "there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions," (*In re: John Doe Grand Jury Proceedings*, 717 A.2d 1129, 1998 R.I. LEXIS 274, *1 (R.I. 1998) (*citing United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983))), these functions do not rise to the same level of a Sixth Amendment confrontation right, thereby requiring this Court to balance them against the privacy interests of the clients of clinical social workers. There is, in fact, a countervailing Fifth Amendment right against self-incrimination held by the clients of clinical social

---

[37]This Court indicated that while it had declared this section unconstitutional in *Bartlett* v. *Danti*, 503 A.2d 515 (R.I. 1986), such unconstitutionality did not dispense with the requirement that the records sought be relevant to the litigation. *Khali Kholi*, 672 A.2d at 436, n.4.

workers that their statements will not be used by grand juries seeking to indict them. Failure to recognize a social worker/client privilege would require clients to sacrifice their Fifth Amendment rights in exchange for mental health care.

Second, while this Court has previously applied a balancing test for the disclosure of medical records in response to a *subpoena duces tecum* issued by a grand jury, there is a significant difference between mental health information and traditional medical information. As discussed above, doctors diagnose and treat their patients using objective tests and physical examinations, while clinical social workers diagnose and treat mental illnesses based in significant part on information provided by their clients. These statements are often subjective perceptions of events based on feelings and emotions, not objective facts or data. This Court implicitly recognized the distinction between subjective and objective information in its decisions in *State* v. *Almonte*, 644 A.2d 295 (R.I. 1994) and *In re: John Doe Grand Jury Proceedings*, 717 A.2d 1129, 1998 R.I. LEXIS 274, *1 (R.I. 1998). In those decisions, this Court examined whether the General Assembly properly limited the discovery of medical information, absent the patient's consent. In *Almonte*, this Court struck down the statute, explaining that the General Assembly did not have the constitutional authority to create an absolute bar to disclosure absent the patient's consent. This Court upheld the statute in *In re John Doe*, R.I. Gen. Laws § 5-37.3-6.1, finding that because the General Assembly inserted a balancing component into the statute, it had struck a sufficient balance between the need for patient confidentiality and a court's need to access relevant information.

Yet in both decisions, this Court implied that only objective tests and technical observations should be discoverable. In *Almonte*, this Court explained that "[t]he term 'confidential communications' usually includes verbal communications from a patient to a physician, but does not

include other 'information' such as a physician's or technician's observations or physical examination of a patient. Therefore, the latter types of information would be admissible in a judicial proceeding in most jurisdictions." *State* v. *Almonte*, 644 A.2d at 299. Furthermore, in *In re John Doe*, this Court pointed out that the medical records for eight (8) out of twelve (12) patients sought by the grand jury were objective blood-alcohol and drug concentration tests, which it subsequently concluded were discoverable. *In re John Doe*, 717 A.2d 1129, 1998 R.I. LEXIS 274, at *2.

Thus, this Court appears already to have distinguished between objective patient information (which it would, in the right circumstances, permit to be discovered) and subjective patient information, the need for confidentiality for which this Court recognizes. Communications between a clinical social worker and her client, and the clinical social worker's notes based on those communications, are of the latter category, and deserving, as the United States Supreme Court concluded in *Jaffee*, of a privilege against disclosure.

Clinical social workers serve a unique and important role in the provision of mental health care in Rhode Island, and are already subject to stringent state and professional regulation on a variety of matters, including the confidentiality of communications with their clients. Clinical social workers' clients expect and need their communications to remain confidential if they are to receive meaningful and effective mental health care. Society recognizes this need for confidentiality, and that the benefits from recognizing a social worker/client privilege greatly outweigh any probative value of such communications. In *Jaffee* v. *Redmond*, the United States Supreme Court recently agreed "in the light of reason and experience". This Court as well has indicated that only certain medical information should be discoverable. Therefore, this Court should, in light of its own reason and

experience, recognize a common law social worker/client privilege protecting communications between clinical social workers and their clients from compelled disclosure.

CONCLUSION

For the foregoing reasons, this Court should overturn the Superior Court's denial of Mr. Glatter's motion to quash the *subpoena duces tecum* issued by the grand jury and exercise its authority under R.I.R.Evid. 501 to recognize an absolute common law social worker/client privilege in Rhode Island.

DATED: February 22, 1999

Respectfully submitted,

Michael L. Goldberg
David A. Kessler
LEWIS, GOLDBERG & BALL
A Professional Corporation
1320 Old Chain Bridge Road, Suite 360
McLean, Virginia 22101-3930
(703) 506-0550

DAK

Carolyn I. Polowy
General Counsel, NASW
750 First Street, N.E., Suite 700
Washington, D.C. 20002-4241
(202) 408-8600

DAK

Mortimer C. Newton
The Remington Building
91 Friendship Street
Providence, RI 02903-3819
(401) 421-1511

Attorneys for the National Association of Social Workers and its Rhode Island Chapter

CERTIFICATE OF SERVICE

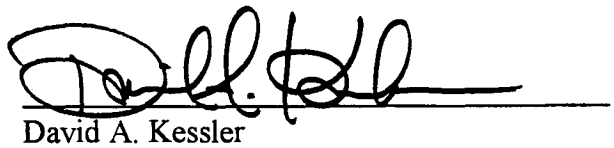
The undersigned certifies that on the 22 day of February, 1999, I caused a copy of the **BRIEF AMICUS CURIAE FOR THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND THE RHODE ISLAND CHAPTER OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS**, to be served via First Class Mail to:

State of Rhode Island and Providence Plantations
Appellate Division
Department of the Attorney General
J. Howard McGrath Judicial Complex
4800 Tower Hill Road
Wakefield, RI 02879

John MacFadyen, Esq.
The Remington Building
91 Friendship Street
Providence, RI 02903-3819

Carolyn I. Polowy, Esq.
National Association of Social Workers
750 First Street, N.E.
Suite 700
Washington, D.C. 20002-4241

Mortimer C. Newton, Esq.
The Remington Building
91 Friendship Street
Providence, RI 02903-3819



David A. Kessler