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OPINION: Therapist's Records Deserve Shield – Confidentiality Critical to Rape Counseling

If Jennifer Bier's client were the accuser in a civilian trial for rape, Bier would not be at risk of going to jail. And just because the person accused is in the military and faces court-martial shouldn't make any difference.

As a counselor in a rape crisis center, Bier is in one of the professions whose members – clergy, doctors and lawyers among them – cannot generally be compelled to testify about a client's case without the client's consent.

In passing laws declaring certain communications privileged, state legislatures have recognized the need to strike a balance. On one side is a defendant's Sixth Amendment right to a fair trial, including the right to call and confront witnesses, and on the other, witnesses' and victims' rights to privacy and due process.

The Colorado Supreme Court has upheld the way the balance is struck in Colorado, where the law says, "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate." Many other states have similar laws, and the U.S. Supreme Court has upheld them in federal cases.

But Bier's client is Jessica Brakey, who says she was raped while she was a cadet at the Air Force Academy. The man she accused, also a cadet at the time, is now an officer, and so the case against him is to be tried under the rules of military justice.

Do those rules protect the confidentiality of Bier's records? She believes they do. But it turns out no one really knows, in the usual lawyerly sense. Apparently there are no applicable precedents, which is why this case may end up in front of the U.S. Supreme Court.

The military does have a general confidentiality policy, but it is relatively new and has a number of exceptions, one of which might apply to Bier. If so she would be legally obliged to turn over her records, something she says she will not do even if she has to go to jail.

A military judge ruled that her records were not confidential and issued a warrant for her arrest when she refused to comply with his request to see them.

Last week a federal appeals court issued an emergency stay to prevent her arrest. We hope the temporary stay is extended until the case can be decided on the merits. After all, if Bier goes to jail, or Brakey's records are released, those are harms that cannot be undone. But there's been no evidence presented that the records are relevant to the court-martial, and even if there were, the case could be postponed while the legal questions are decided.

On the merits, also, we think the principle of confidentiality should prevail. If it is consistent with civilian justice, it is equally consistent with military justice.