

1 PETER D. KEISLER
 Assistant Attorney General
 2 KEVIN V. RYAN (CSBN 118321)
 United States Attorney
 3 JOANN M. SWANSON (CSBN 88143)
 Chief, Civil Division
 4 CLAIRE T. CORMIER (CSBN 154364)
 Assistant United States Attorney
 5 DEBRA D. FOWLER (VSB 30574)
 Senior Aviation Counsel
 6 ASHLEY E. DEMPSEY (CSBN 198791)
 Trial Attorney
 7 Civil Division, Torts Branch
 U.S. Department of Justice
 8 Post Office Box 14271
 Washington, DC 20044-4271
 9 Phone: (202) 616-4024
 Fax: (202) 616-4159
 10 email: ashley.dempsey@usdoj.gov

11 Attorneys for United States of America

12 UNITED STATES DISTRICT COURT
 13 NORTHERN DISTRICT OF CALIFORNIA
 14 SAN JOSE DIVISION - E-FILING

15 STEVE FUNDERBURG, et al.,
 16
 17 Plaintiff,
 v.
 18 UNITED STATES OF AMERICA, et
 19 al.
 20 Defendants.

CASE NO. C 02-05461 JW (RS)
 (Consolidated W/ Case No. 03-04006)

**MOTION IN LIMINE TO EXCLUDE
 EVIDENCE OF PLAINTIFFS'
 COUNSELING FROM CHURCH OF
 SCIENTOLOGY; EXHIBITS**

21 AND RELATED AND
 22 CONSOLIDATED ACTIONS

Pretrial Conference: September 14, 2005
 Trial: September 21, 2005

25 Defendant United States of America hereby moves *in limine* to exclude all
 26 evidence that Plaintiffs Steve Funderburg and Mark Booth received post-accident

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 28 Motion in Limine
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1 counseling from members of their church to address Plaintiffs' emotional damages
2 stemming from the crash of an airplane piloted by Plaintiff Mark Sajjadi, M.D. Plaintiffs
3 asserted the clergy-penitent privilege when the United States requested in discovery that
4 Plaintiffs produce all counseling records. Plaintiffs now seek to affirmatively admit
5 counseling evidence at trial as evidence that they mitigated their emotional damages.
6 Admitting this evidence would unfairly prejudice the Defendants and should be
7 precluded. FED. R. EVID. 403.

8 Memorandum of Points and Authorities

9 By way of background, Plaintiffs Mark Booth and Steve Funderburg were
10 involved in the crash of a single engine aircraft in August 2001 near Weaverville,
11 California. Their mother and wife, Susan Funderburg, died in the accident. As a result of
12 that accident, Plaintiffs Booth and Funderburg filed a complaint against the United States
13 under the Federal Tort Claims Act seeking, in relevant part, damages for the infliction of
14 emotional distress.

15 In July 2004, the United States subpoenaed the Church of Scientology of Los
16 Gatos (the Church) seeking all documents evidencing any mental health counseling
17 (including, but not limited to, psychotherapy) provided to Mark Booth or Steve
18 Funderburg by, on behalf of, or by arrangement or referral through, the Church. (Both
19 Plaintiffs asserted that they did not receive any post-accident counseling other than
20 counseling provided by the Church.) After repeated discussions between the parties
21 regarding these documents, the United States brought a motion to compel the Church to
22 produce the counseling records. (Exhibit A, United States Motion to Compel Documents
23 from Non-Party Church of Scientology; Exhibit B, United States Supplemental Brief in
24 Further Support of Motion to Compel Documents from Non-Party Church of
25 Scientology.)

1 Plaintiffs and the Church opposed the United States' motion to compel. (Exhibit
2 C, Non-Party Church of Scientology Los Gatos' Opposition to Motion to Compel.) They
3 argued that the "counseling" or "auditing" records fell under California's clergy-penitent
4 privilege. *See* Cal. Evid. Code. Section 1030. The United States argued, in turn, that the
5 counseling records were directly relevant to Plaintiffs' claims for emotional damages and
6 that, because Plaintiffs had placed their mental states at issue, any privilege over the
7 counseling records had been waived. (Exhibit A, pp. 5-7.) The Court found in favor of
8 Plaintiffs and the Church. (Exhibit D, Order Denying Motion to Compel Production of
9 Documents from Non-Party Church of Scientology.) The Court noted that, while the
10 documents were relevant, they fell under the priest-penitent privilege and therefore
11 neither Plaintiffs nor the Church were required to produce them in discovery. (Exhibit D,
12 pp. 6-7.)

13 At trial, Plaintiffs will ask this Court to award damages for the emotional distress
14 allegedly caused by their involvement in the accident, as well as damages under *Dillon v.*
15 *Legg* for their emotional distress allegedly caused by witnessing Susan Booth's death.
16 (*See* Joint Pre-Trial Conference Statement, filed September 1, 2005, pp. 3-4.) In its
17 defense, the United States will show that Plaintiffs failed to mitigate their emotional
18 damages by failing to obtain qualified counseling after the accident. (*See* Joint Pre-Trial
19 Conference Statement, filed September 1, 2005, p. 27.) The United States will rely, in
20 part, on the opinion of Plaintiffs' psychiatric expert that Mr. Funderburg would
21 specifically benefit from counseling.

22 In response to the United States' "failure to mitigate" defense, Plaintiffs now seek
23 to turn the table on their prior assertion of the priest-penitent privilege and submit
24 evidence that they obtained counseling through the Church. (*See* Joint Pre-Trial
25 Conference Statement, filed September 1 pp. 3-4.) In making this assertion, they will rely
26 on the very evidence they denied the United States access to by asserting the shield of the

1 priest-penitent privilege. Fairness requires that Plaintiffs be prohibited from testifying
2 about or referring to any evidence of counseling at the trial of this matter.

3 Rule 403 of the Federal Rules of Evidence provides that evidence may be
4 excluded “if its probative value is substantially outweighed by the danger of unfair
5 prejudice, confusion of the issues, or misleading the jury, or by considerations of undue
6 delay, waste of time, or needless presentation of cumulative evidence.” FED. R. EVID.
7 403. Federal courts look unfavorably on a civil defendant who asserts a privilege that
8 serves to “shield herself from the opposition's inquiries during discovery only to impale
9 her accusers with surprise testimony at trial.” *United States v. Sixty Thousand Dollars in*
10 *U.S. Currency*, 763 F. Supp. 909, 914 (E.D. Mich. 1991); *see Bourgal v. Robco*
11 *Contracting Enterprises, Ltd.*, 969 F. Supp. 854, 862 (E.D.N.Y. 1997), *aff'd*, 182 F.3d 898
12 (2nd Cir. 1999) (where the court bared defendants from creating issues of fact by
13 withdrawing their asserted Fifth-Amendment privilege at the eleventh-hour and
14 submitting affidavits in support of their opposition to summary judgment.); *see also*
15 *Brooks v. Hilton Casinos Inc.*, 959 F.2d 757, 768 (9th Cir. 1992) (“Plaintiffs who
16 voluntarily come into court and seek economic damages must be prepared to prove their
17 economic loss: ‘The scales of justice would hardly remain equal ... if a party can assert a
18 claim against another and then be able to block all discovery attempts against him by
19 asserting a Fifth Amendment privilege to any interrogation whatsoever upon his claim.’”
20 quoting *Lyons v. Johnson*, 415 F.2d 540, 542 (9th Cir. 1969)).

21 In the present action, the United States was denied an opportunity to conduct
22 discovery on the counseling received by Plaintiffs and, as such, was unable to obtain even
23 the most basic information about the alleged counseling, such as: the length of the
24 counseling sessions; the number of counseling sessions; what methods were used by the
25 counselors; and whether the methods used were successful. Moreover, the United States
26 was denied the assistance of their psychiatric expert in analyzing the counseling records

1 to assess if and how the counseling impacted Plaintiffs' alleged emotional distress.
2 Without knowing the quantity, quality, and content of the counseling provided by the
3 Church, the United States will be severely limited in its ability to challenge Plaintiffs'
4 unsubstantiated and self-serving assertions at trial that they mitigated their emotional
5 damages.

6 If Plaintiffs are permitted to submit counseling evidence at trial when the United
7 States was denied the opportunity to conduct discovery on this issue, Plaintiffs will
8 achieve an unfair and unintended strategic advantage from asserting the priest-penitent
9 privilege. For this and the above-stated reasons, the United States requests that all
10 testimony or other evidence regarding counseling Plaintiffs received from or through the
11 Church of Scientology be excluded from trial.

12 The United States recognizes that this Motion is submitted after the August 3,
13 2005 motion in limine deadline agreed to by the parties. (*See* Joint Request for a
14 Telephone Status Conference, filed July 6, 2005.) However, the United States requests
15 the Court consider this Motion nonetheless. The issue raised by this Motion did not
16 become apparent to the United States until after the Joint Pretrial Conference Statement
17 was filed by the parties on September 1, 2005, well after the August 3rd motion in limine
18 deadline.¹ Because the issue presented in this Motion is relatively simple and
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22 ¹ A draft Joint Pretrial Statement circulated by Kenney and Markowitz (representing the
23 intervenor and counter-defendant) on September 1, 2005, as the proposed final version did not
24 mention Church counseling. The United States was advised that no further changes or additions
25 would be made to the Statement prior to filing. Because the United States did not approve of the
26 proposed Statement, it was forced to file its own statement. Over the weekend of September 10,
27 2005, the United States discovered that the Statement had been modified to add information
28 about Church counseling. (*See* Undisputed Fact Nos. 19 and 21 of the Joint Statement filed
September 1, 2005.) The parties are presently working on drafting a Statement to which all
parties agree.

1 straightforward, there is little prejudice to Plaintiffs by the Court considering this
2 Motion before trial begins on September 21, 2005.

3 Dated: September 13, 2005

Respectfully Submitted.

4 PETER D. KEISLER
5 Assistant Attorney General

6 KEVIN V. RYAN
7 United States Attorney

8 CLAIRE T. CORMIER
9 Assistant United States Attorney

10 By: /s/Ashley E. Dempsey
11 DEBRA D. FOWLER
12 Senior Aviation Counsel
13 ASHLEY E. DEMPSEY
14 Trial Attorney
15 Civil Division, Torts Branch
16 U.S. Department of Justice

17 Of Counsel:

18 Mark Baylen, Esq.
19 Litigation Division, AGC-400
20 Office of the Chief Counsel
21 Federal Aviation Administration
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24
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