Discovery of Mental Health Records in Family Law

BY JULIE A. AUERBACH

Privileges are evidentiary restrictions on the admittance of confidential information in court proceedings. They apply to information communicated in private confidential relationships, such as attorneys and their clients or physicians and their patients. Privileges protect against the forced disclosure of statements and communications at the option of the witness, client, or patient. *See Black's Law Dictionary* 1078 (1979).

Constitutions (privilege against self-incrimination), statutes and the common law create these privileges. One of the oldest privileges dating back to the Roman rule of law is the attorney-client privilege. For an interesting discussion of the history of privileges, see Symposium: Meeting the Needs of Persons with Mental Illness: Best practices and Remaining issues in the law: article the psychotherapist-patient privilege in family court: an exemplar of disharmony between social policy goals, professional ethics and the current state of the law, 29 *N.Ill. U.L. Rev.* 499 (Summer 2009).

The psychotherapist-patient privilege came into effect as a result of the introduction of psychotherapy and the related need for confidentiality and trust to achieve effective psychotherapy. In the 1960s, states began enacting statutes creating evidentiary privileges to protect against the disclosure of communications between psychotherapists and patients.

In 1996, the Supreme Court of the United States was called upon to determine whether the federal courts should recognize a psychotherapist-patient privilege. In *Jaffee v. Redmond*, 518 U.S. 1 (1996), the Supreme Court held that communications between a patient and her therapist were protected from disclosure.

After *Jaffee*, every jurisdiction in the United States recognized some form of a psychotherapist-patient privilege for mental health treatment. The implementation and treatment of this privilege varies among the federal circuit courts and the state courts. "In the states, the law of privilege is riddled with exceptions and has been described as a "crazy quilt pattern of legislation across the country" where social policy goals, professional ethics and legal requirements are all at odds with each other." *See* Symposium, Meeting the Needs of Persons with Mental Illness: Best practices and Remaining issues in the law: article the psychotherapist-patient privilege in family court: an exemplar of disharmony between social policy goals, professional ethics and the current state of the law, *supra* at p. 532.

Most states have recognized exceptions to the privilege in certain circumstances, such as when a patient presents a danger to themselves or others ("dangerous patient" exception), mental health commitment proceedings and

when the mental health/condition of a litigant is an element of a claim or defense ("at issue" exception). Almost all of the states have exceptions to the privilege in cases involving child abuse or neglect.

Custody laws often require courts to consider the mental health of litigants and children. The discovery of privileged mental health records often becomes an issue in dispute. This article will focus on the various legal issues that arise when balancing the privilege of confidential mental health records against formulating a custody order that is in the best interest of a child.

Applicability to Different Mental Health Providers

As pointed out in a footnote in *Jaffee supra*, in 1996 all 50 states and the District of Colombia had statutes governing the psychotherapist-patient privilege. A small number of states granted the privilege to only psychologists and psychologists. Included in those states were Hawaii and North Dakota. Most states applied the protection more broadly. For example, Arizona's privilege extended to all behavioral health professionals. In Texas, the privilege extended to persons "licensed or certified by the State of Texas in the diagnosis, evaluation or treatment of any mental or emotional disorder" or "involved in the treatment or examination of drug abusers." Utah's privilege protected confidential communications made to marriage and family therapists, professional counselors, and psychiatric mental health nurse specialists. *See Jaffee supra* at p. 15, fn. 13.

In noting the above, the *Jaffee* court found that:

> All agree that a psychotherapist privilege covers confidential communications made to licensed psychiatrists and psychologists. We have no hesitation in concluding in this case that the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy. The reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker. . . . the vast majority of States explicitly extend a testimonial privilege to licensed social workers. We therefore agree with the Court of Appeals that "drawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose."
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> *Id.* at pp. 25–26.

See also the Washington D.C. opinion of *Adler v. Adler, 2012 D.C. Super.* LEXIS 10 (2012) Memorandum opinion and order. That court noted that

> By statute, the so-called doctor-patient privilege extends to confidential information obtained by a wide range of mental health professionals—including psychiatrists; psychologists; social workers; psychiatric nurses; and marriage, family, and child counselors—and provides protection for such information equal to that granted to confidential treatment information obtained by licensed physicians in other medical fields and specialties.

Discovery of Mental Health Records of Children

Many states are more protective of the mental health records of children then they are of parents' records, given that children have no control over whether their mental health becomes an issue in custody litigation. In the Texas case of *Abrams v. Jones* 35 S.W. 3d 620 (Texas 2000), the court held that the mental health records of children are privileged and not discoverable by a parent. In Kentucky, the court of appeals in *Williams v. Williams*, 526 S.W. 108 (2017), held that "Children do not lose the privilege because what they said in confidence to a therapist could help or harm a parent's efforts to obtain custody." *Id.* at p. 117.

However, other states are less protective. Illinois provides a parent with unfettered access to a child's mental health records, see *Dymek v. Nyquist* 469 N.E. 2d 659 (Ill. App. Ct. 1984) Further, only one parent is needed to waive the privilege on behalf of the child. *See In re Marriage of Markey* 586 N.E. 350, (Ill. App. Ct 1991).

Some states are resistant to allowing parents to assert the child's privilege on the child's behalf. In Louisiana, once a child is the subject of litigation, the parents are no longer the presumptive privilege holders for their child. *See Carney v. Carney*, 525 So. 2d 357 (La. Ct. App. 1988). In Maryland, as provided in *Nagle v. Hooks*, 460 A.2d 49 (Md. 1983), a parent cannot assert a child's privilege in a custody proceeding. In Kansas and Maryland, a special guardian ad litem is appointed to determine whether the child's psychotherapist privilege should be waived or asserted. *See In re Zappa* 631 P.2d 1245 (Kan. Ct. App. 1981) and Nagle *supra*.

What Information in the Records Is Protected?

The privilege is intended to protect confidential communications from the patient to the mental health provider. However, not all information in mental health records contains confidential information. Courts have held that records pertaining to opinions of treatment providers, diagnoses and suggested courses of treatment are not subject to the privilege. In the Pennsylvania case of *Gates v. Gates*, 967 A. 2d 1024 (2009), the court pointed out that the psychotherapist-patient privilege did not protect opinions, observations and diagnoses. (However, the court went on to note that the privilege set forth in the Pennsylvania Mental Health Procedures Act applied to all documents regarding mental health treatment.)

In Massachusetts, conclusions based upon objective

indicia rather than any communications from the patient may not be protected. Such information includes the fact that treatment was rendered, dates of treatment, certain diagnostic information, billing and insurance records *Adoption of Saul* 804 N.E. 2d 359 (Mass. App. Ct. 2004).

Duties of Treatment Provider

Mental health providers have a duty of confidentiality separate and apart from any evidentiary privilege. The ethical rule of a duty of confidentiality is not limited to court proceedings. It applies to matters that privileges do not cover, such as communications that are not confidential and other secrets. Conversely, the psychotherapist-patient privilege in the family court applies only to confidential communications.

Other states are more protective of the privilege and hold that the initiation of custody litigation in and of itself does not result in waiver.

Waiver of Privilege

Waiver of the privilege, express or implied, often becomes an issue in dispute. Waiver may be implied when the litigant puts their mental health at issue in the case. Waiver may be express when the litigant signs a waiver of her privilege or testifies as to privileged communications in other legal proceedings. Express waiver may also be found where the privileged communications are made in the presence of or disclosed to third parties.

Implied Waiver: Mental Health at Issue in Case

Some states take the position that given the necessity of the courts to consider the mental health of litigants, once custody litigation is initiated, both parties have waived their right to assert the psychotherapist privilege. In *Friedenberg v. Friedenberg,* 161 N.E. 3d 546 (2020) the Ohio Supreme Court held that the mother's mental health records were discoverable because by filing for custody the mother put her mental health at issue in the case. Other states following this less protective approach include Alabama, Alaska, Indiana, Louisiana, Missouri, and Texas. *See* Courtney Waits, "Comment: The Use of Mental Health Records in Child Custody Proceedings," 17 *J. Am. Acad. Matrim. Law* 159 (2001) While the privilege is deemed not to apply, some of these states will require an *in camera* review of the mental health records to determine their relevancy prior to disclosure in the litigation. Friedenberg at p 552.

Other states are more protective of the privilege and hold that the initiation of custody litigation in and of itself does not result in waiver. In the New Jersey Supreme Court case of *Kinsella v. Kinsella*, 696 A.2d 556 (1997), the court noted that the psychotherapist-patient privilege was modeled after the attorney-client privilege. The court held that the psychotherapist-patient privilege should be pierced in only the most compelling of circumstances. Further, the proponent of the privilege must demonstrate that the evidence cannot be obtained from a less intrusive source.

Where no statutory or other traditional exceptions to the privilege apply, the court should not order disclosure of therapy records, even for in camera review by the court, without a prima facie showing that the psychologist-patient privilege should be pierced under Koslov's tripartite test:

1. There must be a legitimate need for the evidence;
2. The evidence must be relevant and material to the issue before the court; and
3. By a fair preponderance of the evidence, the party must show that the information cannot be secured from any less intrusive source.

Id. at p. 572. Other states following this more protective approach are Florida and Maryland. *See* Waits, *supra.*

Many states require litigants to submit to a mental health evaluation as an alternative to the discovery of mental health records, In *Kinsella*, supra, the court noted that "in many cases, information obtained from psychological evaluations prepared for purposes of litigation is more helpful to the court than would be information obtained from parents prior treatment records." *Id.* at p. 579.

The California case of *Simek v. Superior Court*, 172 Cal. Rptr. 564 (1981), provided that it favors alternate means to determine mental health, i.e., through a mental health evaluation. Other states following this approach are Florida (*Roper v. Roper*, 336 So.2d 654, 656 (Fla.Dist.Ct. App. 1976)), Connecticut (*Cabrera v. Cabrera*, 580 A.2d 1227, 1233 (Conn. App. Ct. 1990)), and Idaho (*Barker v. Barker*, 440 P.2d 137,139 (Idaho 1968)).

Express Waiver

Signing a release form to a mental health or custody evaluator or giving verbal authorization to disclose confidential communications to third parties are express waivers of the privilege. Communication made in presence of a third party or voluntarily disclosed to a third party outside of litigation results in a waiver. *See Carpenter v. Burr*, 673 S.E.2d 818 (Ct. App. 2009).

But disclosures to third parties in a mental health treatment session may not constitute an express waiver. The presence of a parent during a therapy session may not destroy the child's privilege as set forth in *U.S. v. Whitney* FDS 2006 U.S. Dist, LEXIS 74522. Similarly, in Connecticut, the presence of a family member does not waive privilege. *See Cabrera v. Cabrera supra.*

Further, the privilege has been found to apply to marriage counseling or group therapy where multiple parties are present. *See Touma v. Touma*, 357 A.2d 25, N.J. Super Ct. Ch Div. 1976); *see also Or. Rev. Stat. Ann*, § 40.262(1) (West 2011) ("If both parties to a marriage have obtained marital and family therapy by a licensed marital and family therapist or a licensed counselor, the therapist or counselor shall not be competent to testify in a domestic relations action other than child custody action concerning information acquired in the course of the therapeutic relationship unless both parties consent."); *see also Lovett v. Super. Ct., 250 Cal. Rptr.* 25, 28–29 (Cal. Ct. App. 1988) (holding that group therapy was privileged since participants were present to further the interests of the treatment).

Partial or Selective Waiver

Waiver may be found to be partial or selective. The fact that a psychotherapist may have disclosed privileged information under her obligation to report information to protect a patient or third party does not amount to a waiver of the privilege for litigation purposes. *U.S. v Hayes* 227 F. 3d 578 (6th Cir 2000).

A partial waiver was found in *Farrow v. Allen*, 608 N.Y.S. 2d 1 (App.Div 1993) where the patient authorized psychiatrist to send letter to third party revealing certain communications during treatment. In *M.M. v. L.M.* 55 A. 3d 1167 (2012), Father's consent to deposition of his treating physician did not amount to waiver of privilege. Father's signed release to provide specific information such as drug treatment and blood tests did not amount to a blanket release of privileged information. Additionally, an in-camera review did not amount to waiver.

In *Gates v. Gates*, *supra*, the mother did not waive privilege by acknowledging the trial court's authority to order her to submit to a mental health evaluation. Further, mother's agreement to release certain documents of prior mental health treatment did not amount to general waiver of all mental health treatment.

Guardian Ad Litem and Mental Health Records

Confusion sometimes arises when a guardian ad litem is involved. Does the guardian ad litem have the right to pierce the privilege?

With respect to a child's mental health records, a guardian ad litem is the holder of the child's privilege and can determine whether the privilege should be asserted or waived. The guardian ad litem has this power, not the parents because the parents have a conflict *See Guardians Ad Litem: Confidentiality and Privilege* 33 J. Am. Acad. Matrimonial Law, 517 (2021).

However, many states provide that the guardian ad litem must abide by the same rules regarding the privilege with respect to the parents records and does not obtain a special status. See the Pennsylvania case of *M.M. v. L.M. supra*, where the court erred in authorizing the guardian ad litem to review the mental health records. Further, *In re: Marriage of Trepeck*, 2007 Cal. App. Unpub. LEXIS 2187, the mother's authorization to allow the guardian ad litem to contact her psychotherapist and obtain privileged information did not amount to a broad waiver of the privilege. But see the Massachusetts case of *P.W. v. M.S.* 857 N.E. d 38 (Mass. App. Ct. 2006), which held that the voluntary release of records to the guardian ad litem may waive the privilege.

Conclusion

With the prevalence of mental health treatment in divorcing and separating families, family law attorneys must understand the issues that can arise with regard to the discovery of mental health records. Not every state has addressed all of the different issues. Family law attorneys may want to cite to other states to support their position on an issue in any given case, understanding that states across the country take different approaches to mental health records in custody litigation. FA

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