

Psychotherapist-Patient Privilege in Children's Cases

December 16, 2022

Approved for 1 Ethics CLE Credit

What is a Privilege?

Evidence 501 (in materials – court rule excerpts p.1)

“The public has a right to every man’s evidence.” – Wigmore

UNLESS . . .

. . . there is a source of law giving some protection to a witness or litigant
(i.e. a “privilege” against testifying)

Example #1: Fifth Amendment of the U.S. Constitution
Privilege against self-incrimination (“right to remain silent”)

Example #2: Alaska Evidence Rule 503
Lawyer-Client Privilege

The Psychotherapist-Patient Privilege

Evidence Rule 504 (in materials: excerpts p.2-4)

Summary: A patient may refuse to disclose and may prevent others from disclosing confidential communications made for the purpose of diagnosis and treatment of the patient.

(**Note:** Evidence Rule 504 protects communications made to a physician or to a psychotherapist.)

What's the Purpose of the Privilege?

Why protect confidential communications to a psychologist or other therapist?

See Case Excerpts (in materials: excerpts p. 7)

Effective psychotherapy requires trust and privacy.

Like other privileges, this rule is protecting an important relationship.

Without this privilege, nobody would tell their therapist anything.

Elements of the P-P Privilege

- A patient
- A psychotherapist (defined to include medical doctor, psychologist, marital or family therapist, LPC)
 - o Licensed (or patient reasonably believes to be licensed)
 - o Why aren't social workers (MSW, LCSW) included? – the *Allred* case
- A confidential communication
 - o Patient must have reasonable expectation of privacy – *Plate v. State*, 925 P.2d 1057, 1066 (Alaska App. 1996)
 - o Communication is confidential if disclosed to a third party if that person is involved to assist the patient or who are participating in treatment under the direction of the psychotherapist
 - o Includes communications in group therapy and family therapy (Ev. Commentary)
- Privilege protects more than the confidential communication between patient and psychotherapist – See Case excerpts (materials: excerpts p.8)
 - o Also protects communication “between or among” the patient, the therapist, and others participating in the patient’s treatment, including family members
 - o Also protects other information generated as a result of the confidential communication, such as test results, perceptions, theories, conclusions – *N.G. v. Superior Court*.

Exceptions

(Evidence Rule 504 says the privilege does not apply to these scenarios)

- Court-ordered examinations, but the exception is supposed to be limited to a particular purpose – MRS v. State, 897 P.2d 63 (Alaska 1995) (delinquency) (admission of court-ordered psych eval in unrelated proceeding violated privilege)
- Where communications to psychotherapist assist in a patient's crime or fraud
- Communications relevant to an element of a claim or defense.
 - o For example, AS 47.10.011(8)(a) requires proof that child suffered mental injury
- Proceedings for involuntary hospitalization
 - o Arguably also secure placement proceedings under AS 47.10.087
 - o Arguably also proceedings to approve psychotropic medication for a foster child over a parent's objection
- Child abuse reports, sort of
 - o Psychotherapist must report child and neglect even if based on a patient's confidential communication – AS 08.06.200(b)
 - o Psychotherapist's report of child abuse does not by itself waive the privilege – State v. R.H., 683 P.2d 269 (Alaska App. 1984)

Waiver

Evidence Rule 510 (in materials: excerpts p. 1)

- Privilege is waived by voluntary disclosure of “**any significant part** of the matter or communication”

- “Limited waiver” is an express waiver of the privilege for one particular communication

- Why use a limited waiver?
 - To disclose what services, treatment, or medication are recommended for a child in an evaluation
 - Ensure that a future evaluator or service provider has accurate patient history
 - Protect the underlying therapeutic relationship by controlling the information flow

CINA Rule 9(b)

(in materials: excerpts p. 5-6)

- Negates certain evidentiary privileges entirely: husband-wife, physician-patient
- Negates a parent's psychotherapist-patient privilege unless the parent shows the need for confidentiality outweighs the need for disclosure
- Provides a **limited** (i.e. not absolute) psychotherapist-patient privilege for the child
- Child's privilege may be claimed by the child, the GAL, and the psychotherapist
 - o Current CINA practice is to presume the privilege applies until it is waived
- Privilege applies to the child unless:
 - 1) It is waived by the child (if older than 12) or the GAL (if younger than 12); OR
 - 2) A party seeking disclosure shows the need for disclosure outweighs the need for confidentiality

Procedure for Disclosure Over Child/GAL Objection

- Factors the court must consider when considering whether to disclose or protect the child's confidential communications are set out in CINA Rule 9(b)(3)(D)
 - Nature of the communication
 - The purposes of AS 47.10 (ie protecting the health and welfare and best interests of children)
 - The purposes of Evidence Rule 504 (protecting the patient-psychotherapist relationship; effective psychotherapy requires trust and privacy)
 - Whether there's another way to obtain the information
 - Whether the public interest and need for disclosure outweighs the potential injury to the patient and the relationship with the psychotherapist)
- In camera review of records prior to potential disclosure is suggested by the rule
- If information is ordered disclosed, court must issue a protective order (Rule 9(b)(3)(E))
 - Limiting the information disclosed – only essential information
 - Limiting who may receive the information – only to persons who need to have it
 - Taking other measures to protect the child and the psychotherapist relationship

Simone H.

Simone H. v. State, DHSS, OCS, 320 P.3d 284 (Alaska 2014)

- Involved motion to compel production of young child's therapy records from the GAL
- Also involved a subpoena to have the child testify at the termination trial
- GAL made a limited waiver of the privilege and disclosed two psychological evaluations of the child
- Court reviewed all the requested records in camera and ultimately prohibited their disclosure
- Court also quashed the subpoena for the child, finding it would be detrimental for the child to testify
- Alaska Supreme Court affirmed – trial court did not abuse its discretion

Practical Issues

- How to claim or waive the child's psychotherapist privilege?
 - See Sample letter and form in materials
 - Also see sample discovery response
 - Make sure to let the therapist know that you are asserting the privilege!

- Advocacy strategies
 - Avoid accidental waiver of the child's privilege
 - Consider a limited waiver in order to disclose evaluations or specific information (ie a letter from the therapist recommending something)

- Litigation strategies
 - Object to discovery requests, which may result in litigating the disclosure issue in a motion to compel filed by the requesting party
 - If a therapist is subpoenaed, consider a motion to quash the subpoena (if all of the therapist's testimony is privileged) or a motion in limine (if only some of the testimony is privileged)

- How to communicate with children and youth about this issue?

The Child's Psych-Patient Privilege in Non-CINA Cases

Evidence Rule 504 – Yes, It Applies!!!

- to juvenile delinquency cases
- to custody or divorce cases
- to child victims in criminal cases
 - to adoptions
 - to minor guardianships

Use It!!!

Don't Forget the Constitution!

- The Alaska Constitution explicitly protects individual privacy rights in Article I, § 22:
 - “The right of the people to privacy is recognized and shall not be infringed.”
- “[T]he close nexus between the psychotherapist-patient privilege and the state constitutional right to privacy requires us to apply the privilege literally and strictly construe any limitation on the privilege.” – State v. R.H.
- Alaska cases discussing privilege issues and constitutional right to privacy:
 - Horton v. State, 2022 WL 855656 (Alaska App. 2022) (psychotherapist)
 - State v. R.H., 683 P.2d 269, 280 (Alaska App. 1984) (psychotherapist)
 - Falcon v. Alaska Pub. Offs. Comm’n, 570 P.2d 469, 480 (Alaska 1977) (physician)
 - Allred v. State, 554 P.2d 411, 416, 421 (Alaska 1976) (psychotherapist)
- Does the constitutional right to privacy protect a patient’s communications with professionals not included in Evidence Rule 504? A social worker? An unlicensed counselor? What is the state action that triggers constitutional protection?
- Where the CINA Rules limit the privacy interests of the child and parents regarding their communications with a psychotherapist, is that constitutional?

Thank you!

Contact me if you want to talk more about privilege issues:

Margie McWilliams
Assistant Public Advocate / GAL
margaret.mcwilliams@alaska.gov