

2009 LICENSED MENTAL HEALTH PRIVILEGE

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On July 26, 2009 a new testimonial privilege becomes effective and will be codified at RCW 5.60.060(9).

The Privilege

"A mental health counselor, independent clinical social worker or marriage and family therapist licensed under chapter 18.225 RCW may not disclose, or be compelled to testify about, any information acquired from persons consulting the individual in a professional capacity when the information was necessary to enable the individual to render professional services to those persons except:

The Five Stated Exceptions

1. With the written authorization of that person or [that person's personal representative];
2. If the person waives the privilege by bringing charges against the [licensee];
3. In response to a subpoena from the secretary of health. The secretary may subpoena only records related to a complaint or report under RCW 18.130.050 [of the Uniform Disciplinary Act];
4. As required under chapter 26.44 [for child abuse or neglect] or 74.34 [for vulnerable adults] RCW or RCW 71.05.360(8) and (9) [for involuntary treatment proceedings]; or
5. To any individual if the [licensee] reasonably believes that disclosure will avoid or minimize an imminent danger to the health or safety of the individual or any other individual; however, there is no obligation on the part of the provider to so disclose."

The Role of the Court in Determining Admissibility of Evidence

In the Matter of the Interest of J.F., 109 Wn. App. 718 (Division One, December 31, 2001), our state's Court of Appeals recognized a counselor-patient privilege originally granted in 1987 and codified as RCW 18.19.180. It also recognized the principle that Courts read statutory privileges narrowly, but read exceptions to the privilege more broadly than the privilege itself.

In determining the admissibility of evidence over a claim of privilege, our state's Supreme Court has approved the use of a balancing test.

The Balance

It said In *Dike v. Dike*, 75 Wn.2d 1 (1968), "The court is faced with the task of balancing society's interest in the free and open flow of communication between attorney and client, which the privilege promotes, against society's interest in the administration of justice by our courts on the basis of a full disclosure of the facts and with the affirmative assistance of attorneys, which the privilege discourages."

Application of the Balance

In the Dike case, [The attorney] was not privileged to withhold his client's whereabouts from the court, [where the client had removed and secreted her child in violation of a custodial order.] The Court went on to say: "The necessity for unhindered communication between attorney and client is outweighed, not so much by society's interest in having the truth disclosed as to crimes already completed, but rather by society's interest in protecting the present and future victims of the client. In other words, although we will not discard the privilege when the sole purpose in doing so is merely to punish the client for a wrong committed in the past, nevertheless we will not allow the shield of silence constructed by the privilege to aid the client in continuing his wrongdoing at the expense of other members of society."

Future Cases

We can anticipate future cases which might well consider:

1. The scope of the privilege itself, given its stated "necessary information" limitation;
2. The scope of the privilege as to patient statements about the commission of future crimes and fraud, including financial harm;
3. Whether the presence of a third party in the counseling session necessarily waives the privilege.

The Role of the Practitioner

Clinicians need to remember that the testimonial privilege belongs to the client. It needs to be invoked by the client. But the clinician must guard against mistakenly waiving the client's privilege. And, the clinician should promptly notify the client:

1. Upon receipt of a notice of intent to obtain health care records
2. Upon receipt of a subpoena for records
3. Upon receipt of a subpoena for the clinician's deposition
4. Upon receipt of a subpoena for the clinician's testimony at a hearing or trial

The prompt notice is always important in helping the client meet a potential deadline.

Clinicians need to also remember that the existence of a testimonial privilege does not add to, or subtract from, the duties of a clinician to observe and preserve the confidentiality of a client's individually identifiable health information. Those duties are largely set out in the uniform health care information act at RCW 70.02.

Now might be a good time for clinicians to review and perhaps expand their client disclosure material in describing confidentiality, and its limits. And, that client disclosure material should mention privilege. One possible example of such language now follows:

Confidentiality Language

I have provided you with a copy of my Notice of Privacy Practices which describes how I may use and disclose your health information. In this document I want to highlight for you some of those disclosures: (1) to report suspected abuse of a child, of a developmentally disabled person, or of a dependent adult; (2) to interrupt potential suicidal behavior; (3) to intervene against threatened harm to another (which may include knowledge that a client is HIV positive but is unwilling to inform others with whom he/she is intimately involved); and (4) when required by court order or other compulsory process.

Disclosures may also be made if you sign a written authorization permitting disclosure, or in the event that you file a complaint against me. Payment by check permits bank employees

to view names of my clients, and if you have caller identification on your phone, my name may appear on the monitor.

Testimonial Privilege Language

If you become involved in legal proceedings, you may be entitled to obtain a judicial ruling that my records and my recollections pertaining to you are privileged and should be excluded from admission into evidence. You are responsible for claiming privilege in a timely and an acceptable manner. You should seek your own legal counsel for a full explanation of privilege and for possible assistance in properly asserting a privilege claim.

After Thoughts

In 2001, the legislature enacted legislation to license mental health counselors, independent clinical social workers and marriage and family therapists separately under chapter 18.225 RCW. Those licensees were no longer subject to RCW 18.19. The privilege under RCW 18.19.180 no longer applied them. That gap remained until 2003 when the legislature enacted a new privilege codified at RCW 18.225.105. That 2003 privilege seems now to have been orphaned by the 2009 privilege.