

## Psychologists And The Legal Morass

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Recent court decisions have created unprecedented minefields for New Jersey psychologists. Today's practicing psychologists are required to keep a close watch for legal problems that may affect them. It is the purpose of this article to discuss some of the potential risks involved for the psychologist who becomes involved in matrimonial proceedings. This review logically begins with consideration of the psychologist privilege that was originally created by statute;<sup>1</sup> and which, more recently, has been incorporated into the New Jersey Rules of Evidence.<sup>2</sup>

"Privileges" are created by the Law to be exceptions to the general obligation of every person to testify as to all facts inquired of in a courtroom. Professor Wigmore, the noted commentator upon the Law of Evidence, wrote that there are four fundamental conditions that are necessary to the establishment of a privilege against the disclosure of communications:

1. The communications must originate in a confidence that they will not be disclosed: the concept is that what your patient tells you in a therapy session may not be told to anyone else. On the other hand, if the patient tells you the same information at a cocktail party, in a room full of people, the patient may be barred from claiming (when he sues you) that he had a basis for being of the belief that what he told you was in confidence. Query, suppose, at the cocktail party he takes you to a quiet corner and whispers the information in your ear?
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties. This presupposes that there exists a psychologist-patient relationship between the two of you. Suppose, at the same cocktail party, in the same quiet corner, a person who is not yet a patient discusses whether he should seek therapy with you? Suppose that in that discussion he reveals extremely personal information to you. Arguably, what a person tells a therapist who is not his therapist is not protected. Even if that person subsequently enters into a professional relationship with you, you may be compelled by a Court to reveal what he told you prior to the inception of psychologist-patient association.
3. The relation must be one, which in the opinion of the community, ought to be sedulously fostered. This a value judgment made by the community-in this sense each State has the power to decide the extent to which that which was told, during treatment, to a psychologist will be held sacrosanct. There are some specific limitations and exceptions written into the governing statute. These may be explored in a future article. The Statute in New Jersey provides: "The confidential relations and communications between and among a licensed practicing psychologist and individuals, couples,

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<sup>1</sup> N.J.S. 45:14B-28

<sup>2</sup> N.J.R.E. 505

- families, or groups in the course of the practice of psychology are placed on the same basis as those provided between attorney and client. . . .”
4. The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.<sup>3</sup> This kind of “weighing” of potential benefit versus potential detriment is commonly engaged in by judges in a variety of contexts. In *Kinsella v. Kinsella*,<sup>4</sup> the New Jersey Supreme Court refused to pierce the psychologist-patient privilege to allow disclosure of Mr. Kinsella’s therapy records to the wife’s attorney, even though those records, allegedly, included his admission that he had beaten his wife. The Court pointed out that Mrs. Kinsella’s allegations of spousal abuse could be obtained by less intrusive means, such as medical records, testimony of witnesses, and testimony of mental health professionals who were retained or appointed to conduct appropriate investigations in the case. This is the kind of “weighing” referred to in this context. *Kinsella* is a leading case on this point.

Only if these four conditions are present, Professor Wigmore said, should a privilege be recognized.

Privileges are considered to be unnatural concepts that go against an attorney’s inherent sense of what is right and proper. This is because a lawyer’s orientation is that all relevant evidence should be presented to the Court. The notion that a psychologist who has relevant information may be precluded from testifying about that information is heretical to lawyers. Consequently, lawyers’ attacks upon the assertion of a privilege are common.

The purpose of the psychologist’s privilege is to ensure the confidentiality of communications between a licensed psychologist and the “individuals, couples, families or groups” with whom he relates in the course of the practice of psychology. Measured against Professor Wigmore’s four elements defining privilege, there appears to be little room for question as to the need for a broad privilege to preclude disclosure of that information which is told to a psychologist in confidence.

But what happens if one member of the “couple, family or group” may favor, encourage or even demand disclosure, contrary to the wishes of others within the same protected class? The therapist who has not been caught in this uncomfortable position is, I suspect, rare. There is some protection provided in this situation by the Rules’ language to the effect that nothing in the Act may be construed as requiring the disclosure of privileged communications by the psychologist. Yet, the potential for harm to the therapist caught in this situation is readily apparent.

The privilege is intended to be broadly construed. On its face there is the provision for the psychologist privilege to be interpreted “on the same basis” as the attorney-client

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<sup>3</sup> 8 *Wigmore on Evidence*, 3<sup>rd</sup> Ed., Section 2285 et. seq.

<sup>4</sup> *Kinsella v. Kinsella*, 150 N.J. 276, (1997)

privilege. In 1997, the New Jersey Supreme Court held that, in some situations, the psychologist privilege is “even more compelling” than the attorney-client privilege. <sup>4</sup>

The psychologist privilege is, “given greater scope and protection than the physician-patient privilege,” the Appellate Division held in 1994 <sup>5</sup> (arguably leaving psychiatrists at greater risks than psychologists in similar situations). So how, you may ask, with all of this protection, can a psychologist be hurt? Regrettably, it can happen. An example is the decision in Runyon v. Smith.<sup>6</sup> The facts behind that 2000 decision of the Supreme Court are straightforward. Mrs. Runyon sought and obtained a Domestic Violence Temporary Restraining Order that restrained her husband from the marital home. The husband was granted an emergency hearing the following day. Mr. Runyon asserted that Mrs. Runyon was a danger to the children. In support of that position, the husband brought Dr. Smith, a clinical psychologist licensed in New York, to court. Dr. Smith testified that she had been treating Mrs. Runyon for about five years, having last seen Mrs. Runyon about six months earlier. The doctor also testified that she had counseled both Mr. and Mrs. Runyon. Dr. Smith’s testimony was highly harmful to Mrs. Runyon’s case. Some months subsequent to the initial hearing Dr. Smith submitted a written report to the Court, critical of Mrs. Runyon. Based substantially upon the testimony and report of Dr. Smith, the husband was granted custody of the children and Mrs. Runyon’s access to the children was severely restricted. Mrs. Runyon sued Dr. Smith and her employer for money damages. The underlying theory of Mrs. Runyon’s lawsuit was that the psychologist had violated the privilege by revealing to the Court information learned from counseling sessions with Mrs. Runyon. (She also alleged that Dr. Smith had provided the Court with false information, an allegation not relevant to this discussion).

The defense acknowledged that Dr. Smith had testified adversely to her former patient, but justified that testimony on the basis that she was entitled to bear witness in order to protect the best interests of the children. The Appellate Division, applying the criteria established by the Kinsella decision, disagreed with the psychologist’s position, concluding that Dr. Smith had violated the psychologist-patient privilege, and that she could be liable in damages for her unauthorized revelation of confidential information received in the course of treatment. The New Jersey Supreme Court affirmed.<sup>7</sup> The Court found that nothing in the record demonstrated that the children were exposed to danger of a degree that approached the level of danger that triggers the statutory duty to warn.

New Jersey courts have, historically, attached the greatest weight to testimony intended to protect children. This was based upon the common law “*parens patriae*” obligation of the State to be the ultimate protector of children. The traditional practice in New Jersey had been that the Rules of Evidence could be virtually disregarded where custody was at issue.<sup>8</sup> For example, a New Jersey Court had held that, despite a mother’s claim of privilege, the records of her psychiatric commitment could be subpoenaed by the father for, at least, inspection by the judge (who, in custody cases, also fulfills the function of the jury)<sup>9</sup> In another case, the MMPI and other test data utilized

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<sup>5</sup> State v. L.J.P., 270 N.J. Super 429, 438 (App. Div., 1994)

<sup>6</sup> 322 N.J. Super. 236, 245 (App. Div., 1999), aff’d 163 N.J. 439 (2000)

<sup>7</sup> Runyon v. Smith, op. cit.

<sup>8</sup> Callen v. Gill, 7 N.J. 312 (1951)

<sup>9</sup> D.V.D., 108 N.J. Super 149, 152 (Ch. Div., 1969)

by a examining psychologist were ordered to be turned over to the judge for evaluation, with the logical expectation that the data would then be released to the attorneys in the case. The patient's right to assert the privilege against release of that information was referred to in the decision and, then, simply ignored.<sup>10</sup>

If the examples above accurately reflect the traditional thrust of our Law to give lip service to the psychologist privilege and then set it aside if it conflicts with the "best interests" standard, how did Dr. Smith go wrong?

In part, the answer lies in the increasing federalization of family law issues. Until the last few years, each individual state determined the law applicable to families living within its borders. In recent years the federal government has enacted rules and statutes that have modified, or otherwise impacted, these laws of the separate states. The, federal, Restatement of Bill of Rights for Mental Health Patients (42 USC 10841) was enacted, requiring that the individual states revise their laws to ensure that mental health patients receive certain protections. These include promulgation of specific state law provisions requiring confidentiality of, and limiting access to, mental health records (42 USC 10841 (1)(i)). Implementation of these provisions has been rigorous.

The New Jersey Supreme Court appears to have been mindful of the evolving federal law when it rendered its decision in Kinchella v. Kinchella.<sup>11</sup> That is the case that, coupled with the United States Supreme Court decision in Jaffee v. Redmond,<sup>12</sup> established the parameters for defining the psychologist-patient privilege. The reasoning of the Courts begins, in both cases, with judicial recognition that effective psychotherapy depends upon an atmosphere of confidence and trust and that the mere possibility of disclosure of confidential communications may impede development of the relationship necessary for successful treatment. Both the federal and state supreme courts recognized the important public policy involved in assuring that patients are able to receive effective counseling. (Jaffee's therapist was a licensed clinical social worker). These two decisions, read together, explain two, broad, exceptions that satisfy deviation from the general rule that records of psychological treatment are inviolable.

The first exception is where, in the sound opinion of a court of competent jurisdiction, the evidentiary need for disclosure outweighs the patient's privacy interests. The New Jersey court opinion in Kinsella provided detailed instruction to the trial courts as to what criteria are to be utilized in this weighing process. The primary issue in Kinsella was whether the lower court ruled properly, in a custody case, when it ordered the husband to sign authorizations releasing his records of psychological treatment to the opposing attorney. The high court reversed the trial court's ruling, finding that the wife had failed to prove three "foundations" which must be established by a party seeking to pierce the privilege. These foundations, the Court said, were: (a) that there must be demonstrated a legitimate need for the evidence; (b) that the evidence must be relevant and material to an issue before the court; and (c) that, by a fair preponderance of the evidence, the information cannot be secured from any less intrusive source, such as obtaining a separate evaluation by a mental health professional.

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<sup>10</sup> Fitzgibbon v. Fitzgibbon, 197 N.J. Super 63 (Ch. Div., 1984)

<sup>11</sup> op. cit.

<sup>12</sup> 116 S.Ct. 1923 (1996)

The second exception to the general rule favoring confidentiality exists where the patient waives the privilege. The privilege is personal to the patient. It may not be waived by the patient's lawyer, or by the therapist. Although it is the patient who controls the exercise of the psychologist's privilege, it is the duty of the psychologist to, when the issue arises, assert the privilege on the patient's behalf.

Mrs. Runyon, the high Court found, did not waive the privilege, at the time that the therapist initially testified. Neither did she waive the privilege when, six months later, the therapist submitted a report to the court hearing the custody matter. Consequently, Dr. Smith could be liable to Mrs. Runyon for unauthorized disclosure of confidential information on two separate occasions-each of which could give rise to independent damages. Dr. Smith was not protected by her presumed sincere desire to help the children. Her good intentions did not rise to the level of a legally valid defense.

Our law requires psychologists and other mental health professionals to disclose confidential communications when necessary to avoid a clear and imminent danger to the patient or to another readily identifiable person<sup>13</sup> In such a case, there is affirmative duty to warn-and failure to warn might subject the therapist to legal action. The decision in Runyon v. Smith noted, however, "Nothing in this record demonstrates that the children were exposed to danger of a degree that approached the level of danger that triggers the statutory duty to warn."

In the absence of a specific court order requiring the psychologist to answer questions or to provide documents relating to treatment of any patient unless there is a clear "duty to warn," the psychologist should refuse to provide any information without a specific, clear, authorization to provide such information. That authorization should be in writing and signed by the patient. It should designate the precise person or persons to whom the data may be given. Providing data, verbally or in writing, even to the patient's own lawyer, violates the privilege in the absence of express patient authority. Where the practitioner has seen a couple, or a group, releases should be obtained from each person who was involved in the therapy. If every patient in the group or couple does not provide a release, the therapist should refuse to provide any information except as directed to do by a judge.

Verbal release may be, technically, sufficient. On the other hand, when your former patient sues you, do you really want to base your defense on the verbal consent that the former patient denies, or no longer remembers having given you? A generic form of release is annexed to this article. Note the provision for payment by the patient of attorney fees or costs, which you may incur arising out of your providing information pursuant to the patient's authorization. Note further that the scope of the release in the sample format is quite broad. It is important that you do not provide information beyond that which is authorized.

Forensic matters, especially those involving family law, are fraught with dangers for psychologists. There are risks that may accompany giving statements or signing affidavits

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<sup>13</sup> N.J.S. 2A:62A-16

involving patients. Providing information in response to a subpoena, or testifying at a deposition or trial, may result in future litigation against the psychologist. Sadly, the person most likely to sue you is your patient. When faced with these situations, the psychologist should, in every case, seek legal counsel and an appropriate written authorization, signed by the patient before giving out any information.

This article discusses limited issues that have arisen in the New Jersey State Courts. It does not purport to examine the newly enacted Federal legislation. Under either jurisdiction, a prudent practitioner will refuse to deliver to anyone, for any purpose, any patient information in the absence of specific, written, authority signed by the patient, or a valid Order of a court of competent jurisdiction.

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