

The Psychologist's Duty to Warn - Piercing the Psychologist/Patient Privilege

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THE PURPOSE OF PRIVILEGE

The purpose of protecting communications between mental health providers and patients is well-established and fosters the important policy that confidentiality during the course of counseling is essential to establishing trust and to facilitate treatment. There has been a recent amendment which will have an impact on the relationship and trust between mental health provider and patient. On June 13, 2018, New Jersey's Duty to Warn Statute that applies to mental health providers, including Psychologists, was updated to expand waiver of privilege and a duty to warn to include law enforcement officers. While there has been an established duty to warn in specific instances, the recent amendment adds an additional level of duty to notify that mental health providers should be aware.

No privilege is absolute. While the Psychologist/Patient Privilege is one of the most protected privileges in the law and the equivalent to the attorney-client privilege, there are instances when a Psychologist will have a duty to disclose statements which would otherwise qualify as privileged.

New Jersey law and the New Jersey Rules of Evidence set forth the scope of the privilege:

N.J.S.A. 45:14B-28. Confidential relations and communications

The confidential relations and communications between and among a licensed practicing psychologist and individuals, couples, families or groups in the course of the practice of psychology are placed on the same basis as those provided between attorney and client, and nothing in this act shall be construed to require any such privileged communications to be disclosed by any such person.

There is no privilege under this section for any communication: (a) upon an issue of the client's condition in an action to commit the client or otherwise place the client under the control of another or others because of alleged incapacity, or in an action in which the client seeks to establish his competence or in an action to recover damages on account of conduct of the client which constitutes a crime; or (b) upon an issue as to the validity of a document as a will of the client; or (c) upon an issue between parties claiming by testate or intestate succession from a deceased client.

N.J. Stat. Ann. § 45:14B-28; New Jersey Rule of Evidence 505. Psychologist Privilege.

NEW JERSEY'S DUTY TO WARN STATUTE

Recently, on June 13, 2018, New Jersey's Duty to Warn Statute that applies to mental health providers, including Psychologists, was updated and now provides:

2A:62A-16. Health, mental health, and marriage and family therapy professionals; immunity from liability; duty to warn; disclosure of privileged communications

[THE NEW JERSEY DUTY TO WARN STATUTE APPLIES TO PSYCHOLOGISTS]

a. Any person who is licensed in the State of New Jersey to practice psychology, psychiatry, medicine, nursing, clinical social work, or marriage and family therapy, whether or not compensation is received or expected, is immune from any civil liability for a patient's violent act against another person or against himself unless the practitioner has incurred a duty to warn and protect the potential victim as set forth in subsection b. of this section and fails to discharge that duty as set forth in subsection c. of this section.

[THE OBLIGATION TO WARN OCCURS UNDER CERTAIN CONDITIONS]

b. A duty to warn and protect is incurred when the following conditions exist:

- (1) The patient has communicated to that practitioner a threat of imminent, serious physical violence against a readily identifiable individual or against himself and the circumstances are such that a reasonable professional in the practitioner's area of expertise would believe the patient intended to carry out the threat; or
- (2) The circumstances are such that a reasonable professional in the practitioner's area of expertise would believe the patient intended to carry out an act of imminent, serious physical violence against a readily identifiable individual or against himself.

[THE OPTIONS FOR A PSYCHOLOGIST WHEN THE DUTY TO WARN IS TRIGGERED]

c. A licensed practitioner of psychology, psychiatry, medicine, nursing, clinical social work or marriage and family therapy shall discharge the duty to warn and protect as set forth in subsection b. of this section by doing any one or more of the following:

- (1) Arranging for the patient to be admitted voluntarily to a psychiatric unit of a general hospital, a short-term care facility, a special psychiatric hospital or a psychiatric facility, under the provisions of P.L.1987, c. 116 (C.30:4-27.1 et seq.);
- (2) Initiating procedures for involuntary commitment to treatment of the patient to an outpatient treatment provider, a short-term care facility, a special psychiatric hospital or a psychiatric facility, under the provisions of P.L.1987, c. 116 (C.30:4-27.1 et seq.);
- (3) Advising a local law enforcement authority of the patient's threat and the identity of the intended victim;
- (4) Warning the intended victim of the threat, or, in the case of an intended victim who is under the age of 18, warning the parent or guardian of the intended victim; or
- (5) If the patient is under the age of 18 and threatens to commit suicide or bodily injury upon himself, warning the parent or guardian of the patient.

[CIVIL IMMUNITY FOR A PSYCHOLOGIST WHEN COMPLYING WITH THE OPTIONS SET FORTH IN SECTION (c) OF THE DUTY TO WARN STATUTE]

d. A practitioner who is licensed in the State of New Jersey to practice psychology, psychiatry, medicine, nursing, clinical social work or marriage and family therapy who, in complying with subsection c. of this section, discloses a privileged communication, is immune from civil liability in regard to that disclosure.

[RECENT AMENDMENT - ADDITIONAL NOTIFICATION REQUIREMENTS TO LAW ENFORCEMENT AGENCIES]

e. In addition to complying with subsection c. of this section, a licensed practitioner shall notify the chief law enforcement officer of the municipality in which the patient resides or the Superintendent of State Police if the patient resides in a municipality that does not have a full-time police department that a duty to warn and protect has been incurred with respect to the patient and shall provide to the chief law enforcement officer or superintendent, as appropriate, the patient's name and other non-clinical identifying information. The chief law enforcement officer or superintendent, as appropriate, shall use that information to ascertain whether the patient has been issued a firearms purchaser identification card, permit to purchase a handgun, or any other permit or license authorizing possession of a firearm.

N.J. Stat. Ann. § 2A:62A-16.

UNDERSTAND WHEN THE DUTY TO WARN IS TRIGGERED, WHEN DISCLOSURE IS REQUIRED AND THE APPROPRIATE COURSE OF ACTION TO TAKE

It is important for all mental health providers to understand the scope of confidentiality that arises out of the course of treatment. It is equally important for providers to understand when such confidentiality must be breached. Disclosure of information revealed in the course of a trusting relationship may not be an easy call. There may be circumstances presented where the statement is ambiguous or patient's intent is not so clear. Psychologists must familiarize themselves as to what patient communications may need disclosure. Psychologists must familiarize themselves with the available courses of action are available to them, which courses are mandatory and which may be optional. When the disclosures are not clear cut it may be appropriate to consult with an attorney to secure a third party opinion of the appropriate course of action to take in a particular set of circumstances. It may also be appropriate to review documentation a Psychologist provides to patients at the commencement of treatment to include explanations as to the scope of confidentiality and when the Psychologist would be required to disclose patient communications.

Note: This blog does not address when Psychologists are obligated to report child abuse. That topic would be a subject unto itself.

REFERENCES FOR DUTY TO WARN:

N.J. Stat. Ann. § 2A:62A-16.

Tarasoff v. Regents of the University of California, 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334 (1976) (California Supreme Court's landmark 1979 ruling on duty to warn).

McIntosh v. Milano, 168 N.J.Super. 466, 489, 403 A.2d 500 (Law Div.1979)(An early New Jersey case imposing a duty to warn potential victims of a dangerous patient).

Marshall v. Klebanov, 188 N.J. 23, 36, 902 A.2d 873, 881 (2006)(Reviewing the immunity provisions of N.J.S.A. 2A:62A-16 in the context of medical malpractice when a psychiatrist was sued for allegedly abandoning a seriously depressed patient who committed suicide)

REFERENCES FOR PSYCHOLOGIST/PATIENT PRIVILEGE:

N.J. Stat. Ann. § 45:14B-28.

NEW JERSEY RULES OF EVIDENCE, N.J.R.E. 505.

State v. Smith, 307 N.J. Super. 1, 12 (App. Div. 1997), certif. denied, 153 N.J. 216 (1998)(“Whether viewed in the context of the physician-patient privilege or the psychologist-patient privilege, we fully acknowledge that public policy requires protection of the confidentiality of communications made to a therapist in the course of treatment.”).

Arena v. Saphier, 201 N.J. Super. 79, 86 (App. Div. 1985) (In order for counseling to be effective “full disclosure to the therapist of the patient's most intimate emotions, fears and fantasies is required.”)

Taylor v. United States, 222 F. 2d 398, 401 (D.C. Cir. 1955). (The need for trust is especially important in providing mental health treatment, a counselor “must have his patient’s confidence or he cannot help him.”)

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