Discovery Of Mental Health Records in Custody Disputes

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I. Dilemma

A. Can a party in a child custody matter obtain the other party's psychological and psychiatric records?

B. Any litigated custody/placement case falls within the judicial framework. Consequently, any custody case falls within the court's distinctive charge of searching out the "truth" and preserving the fundamental principle that "the public has a right to every man's evidence." Exceptions from this rule are justified by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." ***Trammel v. United States***, 445 U.S. 40 (1980).

C. On the other hand, every individual has the right of privacy, and the right to fully pursue his or her efforts to obtain emotional and psychological help. A veil of protection is necessary in order to insure that the individual is candid and forthcoming with the therapist in order to receive effective assistance.

D. The best interests of a child are a court's paramount concern in determining which parent is the best possible custodian. The paramount concern justifies the exploration of *all potentially* relevant information.

E. These interests clash in a custody dispute, and none of the interests are mutually exclusive. This dilemma affects the way in which we advise our clients, proceed with discovery, and present our case. There are numerous considerations and strategies in struggling with the dilemma in each case. Although we have to advance a particular client's interests, we can find ourselves on each side of the issue with the same attorneys, psychologists/ therapists, judges, and court commissioners.

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II. The scope of the psychotherapist privilege.

A. The dilemma between the court's interests, privacy interests, and the child's interests revolve around the evidentiary privilege concerning medical/psychological/therapeutic treatment. Although different courts call it different names, it can be considered the "psychotherapist privilege."

B. All fifty states and the District of Columbia has enacted into law some form of psychotherapy privilege. The privilege is not a creature of the common law, due in large part because of the common law's preference to "allow each man's evidence."

C. States have enacted the privilege in three general forms. First, there is a general physician-patient privilege, which may include psychological and psychiatric treatment and records (*see, e.g.,* ***Oswald v. Diamond,*** 576 So. 2d 909 (Fla. App. 1991) (although psychologists are not medical doctors, their assessments of mental impairments should not be given less weight than a psychiatrist's). Second, some states have specific statutes designed to protect the communications between psychiatrists/psychologists and patients. Third, some states have enacted broader statutes that apply to communication between patients and a list of "healers."

D. The privilege is generally construed narrowly because it is a derogation of the search of truth. ***United States v. Nixon***, 418 U.S. 683 (1974).

   a. Consequently, some courts will allow the privilege to apply to only those professionals particularly articulated in the statute. For example, in ***Ritt v. Ritt***, 238 A. 2d 196 (N.J.), *rev'd on other grounds*, 244 A.2d 497 (1968), the court ruled that the statutory privilege in effect at that time applied only to psychologists, and therefore, the psychiatrist refusing to release records was ordered to do so.

   b. However, the U.S. Supreme Court created a judicial privilege for federal courts and extended it to licensed social workers. *See* ***Jaffee v. Redmond***, 518 U.S. 1 (1996).

   c. In ***Wiles v. Wiles***, 448 S.E.2d 681 (Ga. 1994), the court extended the scope of "psychiatrist" to medical doctors who devote a substantial portion of their time in the diagnosis and treatment of mental or emotional conditions even though they may not be psychiatrists.

E. The rationale of the privilege is the same from state to state, but worded differently. For example,

> When a patient seeks out the counsel of a psychotherapist, he wants privacy and sanctuary from the world and its pressures. The patient desires in this place of safety an opportunity to be as open and candid as possible to enable the psychotherapist the maximum opportunity to help him with his problems. The patient's purpose would be inhibited and frustrated if his psychotherapist could be compelled to give up his identity without his consent. Public knowledge of treatment by a psychotherapist reveals the existence and, in a general sense, the nature of the malady.
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> ***Smith v. Superior Court***, 173 Cal. Rptr. 145 (1981).

> Like the spousal and attorney client privileges, the psychotherapist patient privilege is "rooted in the imperative need for confidence and trust." Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment. As the Judicial Conference Advisory Committee observed in 1972 when it recommended that Congress recognize a psychotherapist privilege as part of the Proposed Federal Rules of Evidence, a psychiatrist's ability to help her patients "is completely dependent upon [the patients'] willingness and ability to talk freely. This makes it difficult if not impossible for [a psychiatrist] to function without being able to assure . . . patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule . . ., there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment…. The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.
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> ***Jaffee v. Redmond***, supra. (citations omitted).

F. Some privileges extend to records, notes, and communications, while others extend only to communications.

a. In ***Johnson v. Johnson***, 839 S.W.2d 714 (Mo. App. 1992), the court held that the intake form that the husband completed in a counseling center, in which he admitted abusing his wife, was privileged and the wife could not introduce it into testimony during divorce proceedings.

b. In ***McMaster v. Iowa Bd. of Psychology Examiners***, 509 N.W.2d 754 (Iowa 1993), the court construed the state statute narrowly and held that therapist need not testify, but the notes and records were discoverable.

G. The states differ whether privilege extends to others in the psychotherapists office.

a. Cases that extend the privilege to others:

i. The privilege covered unlicensed workers participating in the diagnosis and treatment of a patient as long as they were under the supervision of the psychiatrist. ***Amburgey v. Central Ky. Regional Mental Health Board, Inc.,*** 663 S.W.2d 952 (Ky. App. 1983).

ii. The privilege was extended to the nurse in a psychologist's office. ***Kalenevitch v. Finger***, 595 A.2d 1224 (Tenn. App. 1991).

b. Cases that do not extend the privilege to others:

i. Privilege does not extend to unlicensed therapists although working under the supervision of a licensed therapist. ***State v. Edwards***, 918 S.W.2d 841 (Mo. App. 1996).

ii. Privilege does not extend to an unlicensed person conducting the intake evaluation. ***Lipsey v. State***, 318 S.E.2d 184 (Ga. App. 1984).

iii. Privilege does not extend to student interns providing therapy. ***People v. Gomez***, 185 Cal. Rptr. 155 (App. 1982).

H. What about marriage counseling? When does the privilege apply?

a. The analysis may depend upon whether the marriage counselor is a licensed psychologist, social worker, clergy, or other professional. If the counselor is covered under one of the professions subject to the privilege, the general rule is that both spouses must waive the privilege before the contents of the counseling are disclosed. *See* ***Genovese v. Usner***, 602 So. 2d 1084 (La. App. 1992). If a therapist conducts group and individual counseling, the mere presence of a party in the group portion does not constitute a waiver. ***Guity v. Kandilakis***, 821 S.W.2d 595 (Tenn. App. 1991).

b. Waiver can occur if one spouse testifies about the marriage counseling and the other party does not object. The party that did not object can testify, and the first party testifying cannot object. ***Eichenberger v. Eichenberger***, 613 N.E.2d 678 (Ohio App. 1992).

c. Statements made by one spouse during joint counseling sessions are not protected in a later custody fight. Litigation arising between joint patients does not protect statements made by one party during joint counseling session. ***Redding v. Virginia Mason Medical Center***, 878 P.2d 483 (Wash. App. 1994).

d. In New Jersey, the marriage/family therapist privilege extends to licensed and unlicensed marriage counselors. ***Wichansky v. Wichansky***, 313 A.2d 222 (N.J. Ch. 1973).

e. *Different spin*: A court determined that a man who participated in joint counseling with a former *girlfriend* did not waive the privilege to group or individual sessions during the course of his treatment. The court stated "The strongest public policy considerations militate against allowing a psychiatrist to encourage a person to participate in joint therapy, to obtain his trust and extract all his confidences and place him in the most vulnerable position, and then to abandon him on the trash heap of lost privilege. ***Hulsey v. Stotts, et. al.***, 155 F.R.D. 676 (N.D. Okla. 1994). In regard to joint and separate counseling, "no division may be made as to where one therapy ends and another's begins," so each patient in joint counseling retains the right to prevent disclosure by another—including the joint counselee—of confidential communications related to diagnosis and treatment.

III. How the privilege works.

A. The patient owns the privilege, Imwinkelried, **Evidentiary Foundations** 202 (Michie Company 1982), and thus, only the patient can waive the privilege. If the patient becomes mentally incompetent, that person's

guardian becomes the successor holder of the privilege. However, both the patient and the psychotherapist can assert the privilege.

B. The person asserting the privilege bears the burden of establishing the applicability of the privilege. ***Middleton v. Beckett***, 960 P.2d 1213 (Colo. App. 1998). Generally, a person asserting the privilege must show:

a. That the privilege applies to the type of proceeding in which the privilege is claimed.

b. The claimant of the privilege is asserting the right type of privilege.

c. The claimant is the proper holder of the privilege.

d. The information is communication.

e. The communication was intended to be confidential.

i. As a general rule, the courts usually hold that the communication is not confidential if third parties are present. Imwinkelried at 203. However, assistants within the psychotherapists control are usually not considered third parties destroying the privilege.

ii. In ***Hager v. Bellingham Sch. Dist***., 871 P.2d 1106 (Wash. App. 1994), the court held that the privilege did not apply because the therapist worked for the school district, was working with the student on behavioral problems and it was expected that the evaluation would be seen by others.

iii. Whether a communication is intended to be confidential is determined by intent and the patient's "objectively reasonable" belief. ***State v. Locke***, 502 N.W.2d 891 (Wis. App. 1993).

iv. Information given to a psychotherapist that is intended for subsequent disclosure outside the circle of confidence is not privileged. Imwinkelried at 203.

f. And that the purpose of the communication was for diagnosis or for the treatment of the patient's physical, mental or emotional condition.

i. As a result, communication between a mental health providers and a "patient" for purposes of a psychological evaluation, second-opinion evaluator, consultant, mediator (except mediation privilege may apply), or other evidentiary gathering, would not be privileged. *See, e.g.,* ***Neimann v. Cooley***, 637 N.E.2d 943 (Ohio App. 1994) (purpose of therapy was to make an evaluation for another party; privilege did not apply).

ii. In ***Debry v. Goates***, 2000 UT App. 58 (Utah App. 2000), a psychologist initially interviewed the wife for purposes of a custody evaluation in her first divorce, and then she continued to see the therapist for treatment after the divorce. The goal was clearly therapeutic treatment. Therefore, the privilege was upheld.

g. The communication occurred between properly related parties.

C. Some courts apply a similar but slightly different set of requirements. The privilege has four "fundamental conditions" in order to prevent the disclosure of certain information:

a. The communication must originate in confidence that it will not be disclosed;

b. The element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the therapist and the patient;

c. The relationship must be one which in the opinion of the community ought to be fostered; and

d. The injury that would inure to the relationship by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

8 John Henry Wigmore, **Evidence in Trials at Common Law**, sec. 2285 (McNaughton rev. 1961).

D. If the privilege is established, and the patient refuses to disclose, or refuses to authorize the psychotherapist to disclose, the patient cannot be held in contempt or have discovery sanctions imposed on him or her. Imwinklereid at 202.

E. If the person asserting the privilege has demonstrated the elements above, then the person has a *prima facie* case for protection. The person challenging the privilege must demonstrate that a specific exception applies or the holder of the privilege has waived it. States vary in the number of exceptions. For those states that have exceptions, the relevant ones for purposes of custody litigation include: (1) if the person's mental health is at issue; (2) if the issue revolves around the care and custody of a child, and/or (3) if child abuse or neglect is involved.

F. The privilege is "all or nothing". A therapist will not be allowed to disclose some information and withhold other information. Ackerman & Kane, **Psychological Experts in Divorce Actions** 104 (Aspen 1998). Waivers can be subtle:

a. A waiver must be an intelligent relinquishment of a known right. ***Cabrera v. Cabrera***, 580 A.2d 1227 (Conn. App. 1990). Further, there is no waiver if a third person is present to aid the patient.

b. A waiver can occur on direct examination by referring to privileged communication. For example, the claimant may testify in direct that he told his therapist that he was feeling depressed and he was referred to a doctor for medication. This testimony would be an express reference to the contents of a privileged communication and could constitute a waiver. *See, e.g.,* Imwinklereid at 205.

c. However, a patient's testimony on cross-examination regarding privileged matters will not be construed as a waiver. ***Howard v. Porter***, 35 N.W.2d 837 (Iowa 1949).

d. A waiver can occur if the holder voluntarily discloses privileged information to a third party (unless such disclosure falls under another privilege such as attorney/client, physician, clergy, spouse, etc.). However, in ***Slaton v. Reynolds***, 682 So. 2d 1056 (Ala. App. 1996), the husband did not waive the privilege when he gave a copy of his mental health records to his wife for "safekeeping."

e. Be careful that a failure to assert the privilege at the right time is a waiver of the privilege.

f. If the attorney sends a client to a psychotherapist as part of his or her trial preparation, the information is protected under the work product/attorney-client privilege rather than the psychotherapist privilege. Imwinkelried 203.

g. QUERY: many insurance companies require patients to sign a release so that the company can obtain access to records to monitor progress, verify treatment, etc. Is that *required* release for purposes of obtaining insurance a waiver? Is it voluntary?

G. If there is no exception that directly applies, then the last condition of Wigmore's conditions above is generally used as a way in which to overcome the privilege. (III.c.d., above). Cases that do the balancing are set forth below.

IV. State Courts are divided on how to apply the privilege in custody cases.

There are five basic categories the courts fall into for those that have directly addressed the issue:

A. Courts that interpret statutes that specifically prevent the assertion of privilege in custody matters.

a. ***Harbin v. Harbin***, 495 So.2d 72 (Ala. App. 1986). Where the issue of the mental state of a party to a custody dispute is clearly in controversy, and proper resolution of the custody issue requires disclosure of privileged medical records, the privilege must yield. However, before admitting the records into evidence, the court may review the records prior to the other party accessing them and may conduct a hearing in chambers on the issue of the admissibility of the records. This rule was later extended in ***Slaton v. Slaton***, 683 So.2d 1056 (Ala. App. 1996), such that relevant records can be admissible in visitation cases as well. The same issues as to the parent's fitness to care for a child and be responsible for the child's safety and welfare apply when the parent is seeking custody or unsupervised visitation.

b. ***Smith v. Gayle***, 834 S.W.2d 105 (Tex. App. 1992). A Texas statute allows a court to compel the records in custody cases when disclosure is relevant to any suit affecting the parent-child relationship.

B. Courts that hold that an affirmative request for custody places a parties' mental health into question, and therefore the privilege is automatically waived.

a. ***Atwood v. Atwood***, 550 S.W.2d 465 (KY 1970). Seeking custody automatically waives privilege.

b. ***Clark v. Clark***, 371 N.W.2d 749 (Neb. 1985). Filing a petition alleging fitness to have custody of a child waives the privilege, however, only those portions of records related to the issues are admissible (as opposed to discoverable).

c. ***Owen v. Owen***, 563 N.E.2d 605 (Ind. 1990). A party-patient waives her privilege as to matters causally or historically related to the condition she has put in issue by way of a claim, counter-claim or affirmative defense. The court is to consider the physical and mental health of all individuals involved. The mother waived her privilege by being awarded custody and having to defend the award in postjudgment proceedings.

d. ***In re C.I.***, 580 A.2d 985 (Vt. 1990). A therapist had counseling sessions with the child and the mother. Both the child and the mother objected to a petition to place the child in protective custody, and both therefore, put their mental health in issue and waived the privilege.

e. ***Kirkley v. Kirkley***, 575 So. 2d 509 (La. App. 1991). All evidence may be introduced regarding the fitness of a parent, including the mental and physical health of the parties. Because a party's mental condition is an issue in any child custody matter, the party may not assert the privilege. The court held, however, that should be a protective order to limit the disclosure to only the parties, counsel and expert witnesses.

f. However, denying an allegation made about one's mental health does not necessarily put his or her mental health in issue justifying a waiver of the privilege. ***Slaton v. Reynolds***, 682 So. 2d 1056 (Ala. App. 1996). To hold otherwise would allow the exception to eat up the rule.

C. Courts that hold that a custody dispute, standing alone, does not automatically put the spouse's mental condition in issue. However, a party's mental health may come into issue by making certain claims or based on certain events. In that case, the privilege is waived.

a. ***Miraglia v. Miraglia***, 462 So.2d 507 (Fla. App. 1984). In custody proceedings, the "polestar" is exclusively the welfare of the children. Therefore, the wife's recent suicide attempt put her mental health in issue and long-time psychiatrist testimony could be admitted.

b. ***In re marriage of Nordby***, 705 P. 2d 277 (Wash. App. 1985). Where circumstances clearly indicate neglect, discovery and admissibility of prior psychological records may be warranted.

c. ***Leonard v. Leonard***, 673 So. 2d 97 (Fla. App. 1996). A party filed a protective order to exclude mental health records. Although the mental health of both parents is a factor to be considered in a child custody dispute, this does not mean that a spouse places his or her mental health at issue thereby triggering a waiver of privilege. Neither allegations of mental instability nor denial of such allegations on the part of either parent causes a waiver. To do so would 'eviscerate the privilege.' Waiver may occur in a child custody proceeding only when an adverse event about one's party's mental health status occurs, such as an attempted suicide or voluntary commitment. Even in that case, an independent psychological exam is preferable over violating the privilege because relevant information can be obtained while maintaining confidentiality. *See also* ***Roper v. Roper***, 336 So. 2d 654 (Fla. App. 1976).

d. ***Kinsella v. Kinsella***, 696 A.2d 556 (N.J. 1997). The court held that 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 the following 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.

NOTE: The ***Kinsella*** case provides an excellent summary of the law and policy on the privilege in custody cases.

ALSO NOTE: The ***Kinsella*** court analyzes a 1991 American Psychiatric Association Task Force Report on the value of the privilege. It sets forth suggested findings the court should make before ordering disclosure. They are: (1) the treatment was recent enough to be relevant; (2) substantive independent evidence of serious impairment exists; (3) sufficient evidence is unavailable elsewhere; (4) court-ordered evaluations are an inadequate substitute for disclosure; (5) given the severity of the alleged disorder, communications made in the course of treatment are likely to be relevant. The Task Force suggested that, as a rule,

inpatient treatment records are likely to be more relevant than outpatient records.

e. ***Laznovsky v. Laznovsky***, 2000 MD. 0042039 (Md 2000), while the mental health of a party is an issue, a person seeking custody does not, without more, waive privilege. However, records can be disclosed if necessary claims are alleged and there is no other source for the information.

f. Mere allegations are insufficient to make mental health an issue:

i. ***Cabrera v. Cabrera,*** 580 A.2d 330 (Conn. App. 1990).

ii. ***Schouw v. Schouw***, 593 So. 2d 1200 (Fla. App. 1992).

g. Mere allegations may be sufficient: ***Thompson v. Thompson***, 624 So. 2d 619 (Ala. App. 1993), (father alleged mother was not fit because she was an alcoholic).

D. Courts that hold that the children's paramount interests trump the parties' individual privilege.

a. ***Perry v. Fiuamano***, 403 N.Y.S.2d 382 (App. 1978). Privileged communications should not be disclosed unless the injury that would inure to the relation by the disclosure of the communications is greater than the benefit thereby gained for the correct disposal of litigation. Because a parent's mental state is of great importance, the records should be disclosed. There must be a showing beyond mere conclusory statements that the custody issues require revelation of records.

b. ***M. v. K.,*** 452 A.2d 704 (N.J. Super. Ct. 1982). Marriage counseling privilege does not apply in custody because the children's due process rights and other interests are more important than the policy reasons behind the privilege.

c. ***In re Marriage of Kiister***, 777 P.2d 272 (Kan. 1989). When a party's right of confidentiality is weighed against the best interests of the children, the right of confidentiality must give way.

d. ***DeBlasio v. DeBlasio***, 590 N.Y.S.2d 227 (1992). A party's interest in preserving confidentiality must yield to the paramount interest of protecting the well being of a child. However, only those

records that are related to the claim regarding mental illness should be disclosed.

e. ***Renzi v. Morrison***, 618 N.E. 2d 794 (Ill. App. 1993). Only the patient can release confidential information. A psychiatrist may break the confidentiality only when his or her testimony would be more critical to the interests of justice than is the patient's privilege.

E. Courts that uphold the privilege and prohibit the disclosure of information.

a. ***Griggs v. Griggs***, 707 S.W. 2d 48 (Mo. App. 1986). A statute's provision to consider the mental health of the parties does not operate to waive the privilege. The court noted that a trial court could obtain evidence as to a parties' mental health though an independent mental health examiner.

b. ***Navarre v. Navarre***, 479 N.W.2d 357 (Mich. App. 1991). Privilege not waived in custody disputes. The court held that potentially valuable evidence regarding the condition of parties to a custody dispute must be sacrificed to the perceived greater good of protecting patient relationships. Information from other sources, such as an independent psychological evaluation, is available.

c. ***Lauderdale County Dept. of Human Services v. T.H.G.***, 614 So. 2d 377 (Miss. 1992) The mental health records of parents in a TPR action were excluded. The public interest in facilitating access to mental health professionals by eliminating a fear that confidential information might some day be used in court trumped child's best interests. Neither party filed pleadings putting their mental health in issue, nor did they waive the privilege. Creating an exception for TPR cases could open the floodgate for other exceptions.

d. Note that many courts refusing to overcome for privilege have independent medical examinations as the "fall back".

i. ***Simek v. Superior Court***, 172 Cal. Rptr. 564 (App. 1981). California favors continued involvement of both parties in the life of the children and also favors confidential communication between patient-therapist. Therefore, "to exact waiver of a patient's privilege…as a price for asserting his rights to visit his own child would pose problems of a particularly serious nature." The solution is a court-ordered exam because it protects all interests.

ii. ***Cabrera v. Cabrera***, 580 A.2d 1227 (Conn. App. 1990). The most appropriate source of information about a patient's mental health was examination by an expert witness rather than records of treating therapist.

V. Is the balance between the interests an impossible conundrum?

A. One solution is to prevent the disclosure of information because there is available an independent psychological exam. Such evaluations focus on parenting ability, whereas prior therapy may have nothing to do with parenting. Evaluators are more likely to be objective than therapists. However, the psychological exam cannot necessarily replicate probative informative on a party's mental health. Mental health records are probative of whether a child will do well with a parent because the records were not made in anticipation of a custody battle. There is no incentive to lie about his or her mental state to the therapist and the communications are likely to be truthful. By contrast, a parent has an incentive to look good in a custody evaluation. In therapy, the goal is to get well. In an evaluation, the goal is to look good. Discussions in therapy reflect a true state of mind. Further, evaluators do not always have a complete picture of the family due to the limited time the evaluator spends with the family.

B. If there is an *in camera* inspection of the records, the cat is out of the bag, and the goal of the privilege is destroyed. As the Supreme Court stated in ***Jaffee***: "It appears that all statements made by the patient to the psychotherapist are privileged and are not subject to scrutiny by the trial judge to determine what parts are protected and what parts are not. Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege."

C. *In camera* also has the disadvantage of providing information to a judge out of context without any foundation or explanation. Significant prejudice could arise with little opportunity to timely address the prejudice.

D. If disclosure of the records is in the best interests of the children to obtain all relevant information, and as a result, the records are released, then people won't seek help and provide full disclosure to their therapist. As a result, the best interests of the children are ultimately harmed because the parents are unable or unwilling to seek candid therapy. How, then, are the best interests of the children ultimately served?

E. The threat of disclosure can be harassing and intimidating to a patient. The information may distress or stigmatize the patient before, during and after disclosure. A parent may respond to coerced disclosure by not seeking custody or by making substantial concession about support and property. The disclosure is a strategic weapon on issues other than custody.

F. Disclosure contaminates the therapeutic relationship and provides a chilling effect, which extends to *future* therapy, even with *different* therapist.

G. If the privilege is not upheld, the long-term effect renders the lifting of the privilege meaningless at great loss to therapy. As the Supreme Court stated in ***Jaffe***: "In contrast to the significant public and private interests supporting recognition of the privilege, the likely evidentiary benefit that would result from the denial of the privilege is modest. If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation. Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access--for example, admissions against interest by a party--is unlikely to come into being. This unspoken "evidence" will therefore serve no greater truth seeking function than if it had been spoken or privileged."

VI. Tips on handling privilege issues.

A. The argument that the privilege excludes relevant and reliable evidence that cannot be obtained by any means as a justification for overcoming the privilege should not be, by itself, persuasive. *The purpose of the privilege is to exclude relevant and reliable evidence!*

B. Never, never, never allow a client to sign a release without fully exploring the consequences with him or her. Warn them against signing a release when he or she is with the guardian or evaluator.

C. Be careful when talking to your client's therapist that the privilege is not waived.

D. Counsel may want to argue that since the patient invoked a privilege to suppress information, the information probably would have been unfavorable. It should be pointed out to the judge, guardian ad litem, or evaluator, that it would be inconsistent to grant the privilege and then to

permit an adverse inference from the privilege's invocation. Imwrinkredl at 202. To minimize the negative influence, the lawyer should take the blame for releasing the privilege, not the client.

E. Beware of "back-dooring" the information. For example, the mental health records may not be discoverable for purposes of custody, but they are discoverable in the event that one of the parties makes a claim for spousal support because they are disabled and cannot work. If they are discoverable because the party has put his or her mental health in issue for support, can it be used in custody?

F. If there is ambiguous or old case law regarding privilege, and you want to uphold the privilege, make sure to emphasize the U.S. Supreme Court decision of ***Jaffee*** on the public policy of privilege. This may call into question pre-1996 cases. If you want to overcome the privilege, you obviously argue that the federal pronouncement is not controlling.

G. When in the conundrum, work toward a narrowly tailored protective order. The protective order must estop the parties from claiming waiver and admitting or discovering evidence other than what was covered in the protective order. The protective order is a must, and must address what information is provided, who is the recipient, if the information is disseminated, and what happens to it after the proceeding. Make the protective order a "limited" release without a total waiver. The challenge: who decides what is disclosed and what is not? Limited releases do not constitute full waivers if patient believed limited release was necessary for a specific purpose and intended to maintain confidentiality. See ***Cabrera***, supra.

H. If your state starts with the presumption that both parents are fit or that both parents are presumed to continue as parents, then most custody fights are really fights to *retain* custody that he or she already enjoys, rather than *gain* it. Therefore, asking for what one already has does not put his or her mental health into issue. If allowing the one side the ability to raise the issue and the other's defense puts it into issue, then exception evaporates the rule. Putting the other party to his or her proof does not make it an issue.

I. If the statute does not specifically make an exception, argue that because the privilege is a statutory creature, the court cannot impose exceptions to the statute, nor can the court rewrite the statute.

J. An attorney may want to consider writing to a client's therapist and state that the client has not waived the privilege and request immediate

notification in the event the therapist receives a subpoena, notice of deposition, or other inquiry.

VII. Conclusion

We should strive to do no harm to families, or at least minimize our harm to families. We need to work vigilantly to protect the privilege consistent with the best interests of the children.

We should preserve the privilege to "ensure that parents in need of treatment for mental health problems receive that treatment in an atmosphere of trust which is conducive to success." Children will ultimately be harmed, and the privilege thwarted, if it is waived in every custody case. According to our U.S. Supreme Court, the mental health of our citizenry as a public good is of transcendent importance. "The mental health of citizens is even more important when those citizens are parents. If the privilege remains intact, parents in intact families will be more likely to seek medical help when needed, and many children will not be subjected to the harmful situation of living in a household with a mentally ill parent who does not seek treatment because of fear of losing his or her child." Roberson, "Admissibility of Mental Health Care Records in Custody and Placement Disputes," 18 *Wisconsin Journal of Family Law* 70 (1998).