

# Psychotherapist-Patient Privilege

By K. Dean Kantaras and Briana Texter

An interesting crossover between medicine and law has happened. Both psychotherapists and attorneys have questions about applying the psychotherapist-patient privilege.

The general rule about this privilege is: “A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of the patient’s mental or emotional condition, including alcoholism and other drug addiction, between the patient and the psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. This privilege includes any diagnosis made, and advice given, by the psychotherapist in the course of that relationship.”

Additionally, the privilege can be claimed by the patient, patient’s attorney, a guardian/conservator, personal representative, and psychotherapist. If the psychotherapist claims this privilege, it must only be on behalf of the patient. The psychotherapist’s authority to claim the privilege is presumed unless there is contrary evidence. The privilege does not apply for communications made during a court-ordered examination of the mental or emotional condition of the patient.

Basically, if a patient is visiting a psychotherapist for purposes of their own mental or emotional condition, a privilege of confidentiality generally exists between the patient and the psychotherapist. This means that the psychotherapist cannot reveal the private information that is disclosed during the patient’s visit. Of course, there are exceptions.

The public policy behind the statute is to promote good mental and emotional health. This statute protects those who seek care and improvement. Psychotherapy appointments are supposed to provide safety and comfort to a patient during a time of healing. If information a patient reveals in a psychotherapy appointment could be revealed in court without the patient’s permission, then patients would become highly deterred from seeking treatment.



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While the statute might seem inclusive, there are still many unanswered questions, such as when can a psychotherapist assert or waive this privilege? Can a psychotherapist assert or waive the privilege over the patient’s objection? What happens to privileged evidence that has already been disclosed? Can the privilege be asserted for some information and waived for others, or is it all-inclusive?

With many compelling arguments on all sides, the court’s task to provide answers is no easy feat. The court must carefully weigh each detail on the scales of justice.

In 2021, the Second District Court of Appeals reviewed a child custody case interpreting this statute. During the proceedings, the child’s psychotherapist was subpoenaed to attend depositions and demanded to appear for questioning. During the deposition questions, the psychotherapist brought all her notes and answered questions from both parties. The psychotherapist-client privilege was not asserted at any time during the questioning. When the psychotherapist attended hearings, they did not assert the privilege.

During the final hearing, the psychotherapist asserted the psychotherapist-patient privilege for the first time. On what could have been the last day of the case, the psychotherapist did not want to reveal any information, even the information already disclosed during hearings and depositions.

The trial court allowed the psychotherapist to assert this privilege for all the evidence. This means that all the information disclosed during the prior hearings and depositions was taken out of evidence.

Later, this decision to exclude the evidence was appealed. The Second District Court of Appeals then reviewed the case to determine whether this was proper. It questioned whether this privilege applies to all information, information already disclosed, or some information based on discretion.

The court determined that the trial court made an error in excluding some of this evidence. The court also concluded that the psychotherapist-patient privilege can be asserted at final hearing. However, this privilege may only be asserted to exclude evidence that has not already been disclosed. As such, the information disclosed at the prior hearings and depositions was admissible. Therefore, the case was sent back to the trial court.

The major distinction in this case is that the court now allows the psychotherapist-patient privilege to be waived and asserted based on discretion of the patient or psychotherapist. The privilege is not all-inclusive. This means that if the psychotherapist-patient privilege is waived, this does not waive the privilege for all information available; the waiver only applies to the information disclosed at that time. ❖

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