PROTECTING A DOMESTIC ABUSE VICTIM'S PRIVILEGED COUNSELING COMMUNICATIONS IN FAMILY LAW CASES

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The New Hampshire Supreme Court has not yet had the opportunity to address the issue of whether and when a family law litigant must disclose confidential information about counseling or other mental health treatment. However, as many family law practitioners know, in contested divorce or parenting cases when children are involved, requests to access this information are common.

Family law attorneys need to be careful in handling these discovery requests, especially when clients are victims of domestic or sexual abuse or stalking. Disclosure of such records in these cases can compromise client safety, impede a client's ability to emotionally heal from trauma and perpetuate continued abuse through the legal process.

The New Hampshire Supreme Court articulated a protective policy towards counseling records specifically in In re Berg.1 There it found, “the value of the therapist-patient relationship and of the patient's privacy is intertwined with one of the most important concerns of the courts—the safety and well-being of the children and families.”2 Protecting these records from disclosure helps foster productive relationships between clients and their therapists.3 Even the threat of disclosure could interfere with therapy, as clients cannot trust that the information will be kept confidential and may hold back in the counseling sessions.4 The Berg Court seems to suggest that the public policy behind the mental health privilege may be even more compelling than the policies behind both the attorney-client and the physician-patient privileges.5

In addition to the harm which could result from even the threat of disclosure, releasing records can lead to humiliation and embarrassment. Notes of private therapeutic conversations can be misused and taken out of context in hotly contested divorces.

This article analyzes current New Hampshire law and suggests how to best protect a domestic abuse victim's privileged counseling information. We recommend a highly protective approach when abusers seek to access a victim's privileged mental health records in family law cases.

AND PREVENTING WAIVER

The foundational blocks for invoking privilege are found in court rules and the New Hampshire statutes. Both superior court and family division discovery rules limit discovery to information “not privileged, which is relevant to the subject matter involved in the pending action…”6 New Hampshire Rules of Evidence define privilege to include “confidential relations and communications between a psychologist or pastoral counselor… and his or her client.”7 The Rules of Evidence place this privilege “on the same basis as those provided by law between attorney and client” and refers specifically to the mental health privilege statute, RSA 330-A.8 Additionally, New Hampshire's Domestic Violence law prevents disclosure of communications between domestic and sexual violence counselors (commonly known as crisis center advocates) and their clients, indicating a policy toward protecting these specific kinds of communications.9

In the first instance, a party should invoke the mental health privilege (as well as any other applicable privilege) in order to prevent possible waiver.10 And a person who “knowingly or voluntarily discloses or consents to disclosure for any significant part of the privileged matter” will have arguably waived it.11 Otherwise known as express waiver, if your client testifies about the privileged information, the client could be deemed to have “opened the door” and it may be difficult to close it.12 Clients need to be educated about how what they say in court could lead to an express waiver. Assuming express waiver has not occurred, the analysis does not stop here.

PREVENTING WAIVER: NEXT STEPS TO PROTECTING PRIVILEGED INFORMATION

The leading New Hampshire case to provide guidance on how to protect privileged mental health information is Desclos v. Southern New Hampshire Medical Center.13 Desclos is a medical negligence case where plaintiff claimed damages including pain and suffering, loss of earning capacity and loss of enjoyment of life. Defendants in that case asked plaintiff to produce certain confidential psychiatric and psychological records. Plaintiff claimed those records were privileged and when the trial
One question in representing victims is whether a claim of domestic violence in evidence of medical or psychological treatment to support her damage mental health diagnosis.

The Desclos Court first decided that the trial court had improperly applied a relevance standard to the disclosure issue. It outlined “two means by which disclosure of privileged information may occur: (1) the court finds a waiver of the privilege; or (2) the court orders a piercing of the privilege.” Desclos examined whether the plaintiff had waived her psychotherapist-patient privilege when she put her emotional condition “at issue” by virtue of her specific damages claims.

**IMPLIED WAIVER**

To find implied waiver, a court must determine first whether a litigant has placed his or her privileged information at issue in the case. If the information will be considered at issue if the litigant has “injected the privileged material into the case such that the information is actually required for resolution of the issue.” If the answer is “yes,” the litigant “must either waive the privilege as to that information” or be prevented from using the privileged information to establish the elements of the case. The Desclos Court looked at other jurisdictions to evaluate whether the plaintiff, whose damages claims included certain mental suffering, had placed her mental status at issue.

In so doing, it adopted the Missouri Supreme Court’s analysis of a sexual harassment/discrimination case where that plaintiff claimed damages for emotional distress, humiliation, inconvenience, and loss of enjoyment of life. In Cunningham, the Missouri Supreme Court held that plaintiff did not place her mental status at issue because she claimed generic mental suffering and damages resulting from various incidents described in her suit. The Missouri Supreme Court found that generic mental suffering is the kind of suffering that can be inferred from the circumstances without the need for expert testimony or evidence of a mental health diagnosis. The court cautioned that if a plaintiff brings in evidence of medical or psychological treatment to support her damage claims, she would waive the privilege, because she would have put her mental state at issue in the case.

Like the Cunningham court, the Desclos Court differentiated between what it called “generic mental suffering” and the kind of suffering defined by a medically diagnosed mental condition. It defined “generic mental suffering” as the mental suffering that is in the common experience of jurors, does not depend upon expert evidence, and does not exceed the kind of mental suffering that an ordinary person would experience in similar circumstances. It concluded that if a cause of action for a physical injury involves a claim of “generic mental suffering” then the petitioner’s privileged mental health information will not be required for the resolution of the issue.

However, the Court found that if the trial court determines that plaintiff’s claims involve a clinically diagnosed disorder, such as depression or post-traumatic stress disorder, or require expert testimony or other expert evidence regarding her “mental suffering,” the psychotherapist-patient privilege is waived. In such a case, the waiver is only to those therapeutic records “necessary to resolve [plaintiff’s] claims, which may require in camera review.”

**DO ALLEGATIONS OF DOMESTIC VIOLENCE PLACE A VICTIM’S MENTAL STATUS AT ISSUE?**

One question in representing victims is whether a claim of domestic violence in the context of a family law case would require disclosing privileged counseling records for the resolution of that issue. Making such a claim does not in and of itself lead to implied waiver and disclosure.

A litigant’s testimony of mental suffering due to physical acts of violence and threats of violence would constitute the kind of suffering an ordinary person would experience in similar circumstances. Like the situation in Cunningham, where the plaintiff alleged sexual harassment and discrimination, a litigant’s claims of domestic violence can be determined without having to disclose protected mental health information. Domestic violence is akin to sexual harassment in that the average person — or marital master or judge — could understand how violence, threats of violence and even emotional abuse, could affect the ordinary person. The litigant’s privileged mental health information will not be required for the resolution of the issue.

However, attorneys will need to analyze whether lay testimony itself is sufficient to demonstrate domestic violence and its effects, whether the client should disclose a clinical diagnosis such as post-traumatic stress disorder, and whether expert testimony is needed to describe the effects of domestic abuse. Ultimately, it will depend on what you are trying to prove. Privileged counseling information should not be needed to resolve the issue of whether domestic violence occurred. If the client is alleging fault, and a specific mental health diagnosis as a result of abuse, however, the client may need to disclose some privileged information as he or she may place mental status at issue.

Two grounds commonly cited when domestic abuse has occurred are extreme cruelty and/or that a party “has so treated the other as seriously to injure health or endanger reason.” Pleading these fault grounds does not necessarily lead to implied waiver. However, if proving the fault ground will require the use of an expert to testify about any psychologi-
cral effects of domestic or sexual abuse on the client, your client could be found to have waived the privilege to withhold from disclosure any existing mental health records related to those psychological effects.

In Kinsella, the New Jersey Supreme Court analyzed whether a husband pleading fault grounds in divorce placed his mental health in issue. The New Hampshire Supreme Court looked to Kinsella in In re Berg as the New Jersey mental health privilege statute is similar to New Hampshire’s. In Kinsella, the husband pled “extreme cruelty” as grounds for the divorce. The husband was not planning to introduce evidence of any psychological damage caused by the cruelty, but rather evidence to demonstrate wife’s cruel behaviors toward him. After a thorough analysis of New Jersey’s fault ground statute, the Kinsella court ultimately found that it could decide fault without having to consider the effect of the wife’s behavior on the husband’s mental state.

The lesson for a New Hampshire attorney is to determine whether pleading fault grounds will require proving the effect of the domestic violence beyond “generic suffering.” If so, the court could consider a possible implied waiver of any privileged mental health information concerning specific psychological damage. Thus, the attorney must do a cost-benefit analysis with the client as to whether exposing a client to possible waiver – and likely disclosure of at least some protected records - will ultimately benefit the client in the outcome of the case (i.e. by benefitting from a larger share in the division of property).

WILL PARTICIPATION IN A PARENTING CASE IN AND OF ITSELF PLACE A PERSON’S MENTAL STATUS AT ISSUE?

The New Hampshire Supreme Court has not had the opportunity to rule on whether bringing a parenting claim in and of itself places that person’s mental health status at issue, but several other jurisdictions have addressed this issue with most finding against implied waiver.

In Kinsella, New Jersey held that a parent does not automatically place his or her mental status at issue by participating in a parenting case. New Hampshire’s Supreme Court has cited to this New Jersey precedent favorably in reference to what it found to be important public disclosure.

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“some specific concern, based on more than bare conjecture, that, in reasonable probability, will be explained by the information sought,” the initial “material and relevant” burden is not met.\textsuperscript{45}

If the court finds there is a reasonable probability that the privileged mental health information is “material and relevant,” then the party seeking the information must next show that the information sought is “essential,” i.e. that there is an “essential need” for the information.\textsuperscript{46} The Court specifically outlines what a party must prove to establish that there is an “essential need” for the information.\textsuperscript{47} First, the party seeking disclosure must prove that the information is unavailable from another source.\textsuperscript{48} And second, the party must show that there is a “compelling justification” for its disclosure.\textsuperscript{49}

The Desclos Court adopted a three-part test to determine whether the information is unavailable from another source.\textsuperscript{50} Basically, the court tries to determine whether “a reasonable alternative source of information is available” other than the privileged information.\textsuperscript{51} The three part test examines: (1) whether the alternative evidence is admissible at trial; (2) whether the alternative evidence is sufficient to overcome a motion for directed verdict, when applicable; and (3) whether the party seeking to pierce the privilege has made adequate efforts to investigate alternative sources.\textsuperscript{52}

The first two parts of the availability/alternative source test relate mainly to whether the information would be available for trial whereas the Desclos Court considered the third part of the test as the “most rigorous” standard.\textsuperscript{53} It requires the party to make an offer of proof demonstrating “substantial, good faith efforts to discover alternative sources of competent evidence.”\textsuperscript{54} This is a question of fact for the trial court requiring the requesting party to make more than “conclusory statements” about the unavailability of alternative evidence.\textsuperscript{55} Similarly, the requesting party cannot simply argue that the privileged information is the best or most easily obtained source for it.\textsuperscript{56} The court, however, would not require a total exhaustion of alternative sources of information that offer “little chance of revealing alternative evidence” for the unavailable standard to be met.\textsuperscript{57}

If the requesting party establishes that there is no reasonable alternative source of information available (therefore establishing that it is unavailable), that party must still demonstrate that there is a “compelling justification for its disclosure.”\textsuperscript{58} The Desclos Court noted that “we will find a compelling justification for the disclosure of privileged information when a sufficiently important public interest is at stake.”\textsuperscript{59} In a case involving domestic violence, the compelling public interest in protecting the safety of domestic violence survivors strongly mitigates against disclosure of privileged mental health information.\textsuperscript{60} Therefore, unless the party seeking disclosure has demonstrated that the information is “material and relevant to the party’s defense or claim” and that there is an “essential need” for the information (it is unavailable from another source and there is a compelling justification for its release), the trial court should not allow even disclosure of privileged mental health information for its own in camera review.

In New Jersey, the Kinsella court placed a similarly high burden on the party seeking to pierce the mental health privilege. That case involved divorce and custody where both parties alleged fault and wife alleged domestic abuse.\textsuperscript{61} The wife wanted to pierce the husband’s privilege in part to support her claim that husband had disclosed beating her to his therapist.\textsuperscript{52} The court declined to pierce the privilege based on this claim because it found the evidence of domestic abuse was available through wife’s testimony, other witnesses, and testimony of psychologists “retained or appointed” to conduct investigations of the case.\textsuperscript{63}

Applying this same analysis to protecting a domestic abuse victim’s records, a court could similarly find that evidence about a victim’s reliability and/or mental state can be obtained through cross-examination, witness testimony and possibly through an independent psychological evaluation. (More on psychological evaluations below).

If a party successfully argues for piercing the privilege, then the trial court must conduct an in camera review of the confidential information and limit disclosure to only what is relevant and necessary to the purpose for which the disclosure was ordered.\textsuperscript{64} Attorneys should also request additional protective orders to seal the records in the file and to prevent further distribution or disclosure. Protective orders could include keeping the records under seal and even prohibiting the taking of pictures or video of the records. The New Hampshire Supreme Court has held a trial court may keep records under seal and even not disclose to counsel “those portions of the records that the trial court deemed not to be essential and reasonably necessary to the defense.”\textsuperscript{65}

**SHOULD AN INDEPENDENT PSYCHOLOGICAL EVALUATION BE CONSIDERED AN ALTERNATIVE SOURCE OF INFORMATION TO THE PRIVILEGED MENTAL HEALTH RECORDS?**
In the context of a parenting case where domestic abuse is alleged, both parties may be interested in requesting access to the other party’s psychological records. A victim may believe the records will support her claim of abuse, and an abuser may argue the victim’s records will provide contrary information. A court could conceivably determine these requests would lead to “material and relevant” information. A court would still have to, at a minimum, evaluate whether there is an “essential need” for the privileged information. In so doing, it would first evaluate whether the information is available from an alternative source and second, determine whether or not there is a “compelling justification” for disclosure. If it appears that a court is leaning toward allowing for disclosure of some or all the privileged mental health information, attorneys may want to consider offering an independent psychological evaluation as an alternative source of information to the privileged mental health records.

Setting aside costs, such evaluations would seem to lead to information that would assist a court in deciding a contested parenting case. In fact, New Hampshire’s discovery rules allow for a party to request an appointed psychological evaluation of the parent whose mental fitness is being questioned.66 (And we are not suggesting that questioning a domestic violence victim’s mental fitness would be sufficient to order such an evaluation.)

One problem with such evaluations is that New Hampshire does not currently have any standards or guidelines about the use and value of psychological evaluations in measuring parenting ability, domestic abuse, the credibility of a victim or abuser, or any other issues the court may deem “material and relevant” to the parenting case. Without clear standards, psychological evaluations may shed little to no light on the issue of parenting — and could in some instances mislead courts about domestic violence. Attorneys and courts should be thoughtful about how to choose an evaluator ensuring that person has training and credentials to conduct an evaluation that best measures the issues deemed material and relevant to the case. A skeptical approach is advised when using this information to determine what is in a child’s best interest.67

On the other hand, an independent psychological evaluator should provide a court with an impartial source and more objective assessment of mental fitness than would a parent’s therapist who has developed a therapist-patient relationship over an extended period of time.68 Several jurisdictions have found the availability of this alternative source on the mental health of a parent to weigh against the need to pierce the therapist-patient privilege.69 If the party seeking to pierce the privilege persuades the court the information sought is “material and relevant” and there is an “essential need” for it, the party trying to protect privileged mental-health records may want to offer to submit to an independent evaluation as an alternative source of the information sought. Doing so should lead a court to deny the request to pierce the privilege.70

As a practical matter, if an independent psychological evaluator is appointed, that evaluator may wish to consult with a party’s treating therapist. In that situation, the party may consider signing a limited release allowing verbal contact between evaluator and therapist. This should not constitute express or implied waiver; however, attorneys are cautioned to request that a court make orders to protect those communications before releases are signed.71

CONCLUSION

We’ve outlined why, as a matter of public policy, attorneys should advocate for protecting privileged mental health records from disclosure in family cases: protecting a personal privacy interest; preventing personal information from being mischaracterized or misconstrued; and preventing records from being used to embarrass and humiliate. These policy reasons become more acute when the party seeking disclosure is an abuser trying to access a victim’s protected mental health information.

Victims of domestic or sexual abuse or stalking face many obstacles when trying to leave. Safety is first and foremost. Allowing abusers access to privileged mental health information can increase danger and exacerbate an already volatile situation. For instance, an abuser may feel entitled to physically or psychologically punish the victim for the words spoken in therapy and an abuser can use the information to stalk the survivor.

Additionally, even the threat that counseling information may be accessed can dampen, if not extinguish, any trust that the victim has in the therapist-client relationship. This allows an abuser to maintain the ultimate control—preventing a victim from psychologically healing and moving past the abuse and trauma. It can curtail a victim’s willingness to seek out sometimes needed therapy to overcome or deal with trauma effectively. It can lead to continued victimization through the legal process.

Attorneys representing victims need to adopt a highly protective approach when it comes to victims’ privileged mental health records. Participating in a divorce or parenting case — or pursuing a domestic violence restraining order — should rarely require divulging any protected mental health information for all the reasons stated above.

ENDNOTES

2. Id. (citing Kinsella v. Kinsella, 696 A.2d 556, 584 (N.J. 1997)).
3. In re Berg, 152 N.H at 665 (citing Jaffee v. Redmond, 518 U.S. 1, 10 (1996)).
4. Id.
5. In re Berg, 152 N.H at 664.
6. New Hampshire Superior Court Rule 35 b; New Hampshire Circuit Court Family Division Rule 1.25 C.
8. Id.
9. N.H. Rev. Stat. Ann. 173-C. Note that this statute also specifically addresses how courts should handle waiver or partial waiver of this privilege.
10. See New Hampshire Superior Court Rule 35 b. Scope of Discovery. There is no rule requiring the notification of privilege claims to the opposing party in the NH Circuit Court – Family Division rules, but such notification is an appropriate precautionary measure.
12. New Hampshire Rule of Evidence 510; See RSA 173-C (canving out an exception to waiver and allowing for “partial waiver” if some communications are disclosed.)
14. Id. at 611.
15. Id. (citing Order of Dean, 142 N.H. 889, 890 (1988)).
17. Desclos, 153 N.H. at 611.
43. Desclsos, 153 N.H. at 615.
44. Id. at 615-16.
45. Id. at 615-16.
46. Id. at 615-16.
47. Id. at 615-16.
48. Id. at 616.
49. Id. at 617.
50. Id. at 617.
51. Id. at 618.
52. Id.
53. Id. at 619.
54. Id. at 619.
56. See Rules of the Circuit Court of the State of New Hampshire - - Family Division 1.25 B Discovery Methods (“Parties may obtain discovery by... mental examinations”); cf. FED. R. CIV. P. 35 (“[t]he court where the action is pending may order a party whose mental or physical condition is in controversy to submit to a physical or mental examination.”)
57. For an in-depth review of the use of psychological evaluations in parenting cases, see Domestic Violence, Abuse, and Child Custody: Legal Strategies and Policy Issues, Editors: Mo Therese Hannah, Ph.D. and Barry Goldstein, J.D., Civic Research Institute (2010).
58. Id. at 579.
60. Peisach v. Antuna, 539 So.2d 544, 546 (Fla.App. 3 Dist., 1989) (Protective order preventing deposition of party’s former psychiatrist granted “Because the wife has agreed to submit to a psychological examination, the husband and the court will be adequately apprised of her present psychological condition.”)
61. Kinsella, 696 A.2d at 583-84.

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