



CLIENT ALERT

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BEHAVIORAL HEALTH CLIENT ALERT: NEW CASE LAW ON WHEN A BEHAVIORAL HEALTH PROFESSIONAL MAY TESTIFY AS AN ACQUAINTANCE WITNESS IN A COMMITMENT PROCEEDING

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On June 23, 2020, the Arizona Court of Appeals issued its opinion concerning *In Re: MH2019-004895*, vacating the trial court's order for involuntary treatment because the trial court improperly allowed the patient's clinical liaison to testify about confidential information in violation of the behavioral health professional-client privilege. This opinion has several important changes and clarifications for our behavioral healthcare clients.

1. The Behavioral Health Professional-Client Privilege Is Broad

First, the opinion re-establishes the concept of a behavioral health professional-client privilege, in addition to a psychologist-patient privilege, and clarifies that this privilege is as sacred as that between attorney and client. See Opinion ¶ 7.¹

In some ways, the privilege here may be greater than that between an attorney and client. The court explained that the behavioral health professional-client privilege is broader because it "protects information received by reason of the relationship," and not only the confidential communications between the professional and patient. See Opinion ¶ 15. In *In Re: MH2019-004895*, each of the professional's observations about the patient (to which she testified) occurred *because* she was the patient's clinical liaison, and therefore, those observations constituted information the professional received by reason of her confidential relationship with the patient—meaning they were protected communications.

In short, the information a behavioral health professional receives, whether by hearing words directly from a patient or by the professional's own observations of the patient's behavior, is protected by the privilege *because the professional acquired the information in the course of providing mental health services to the patient*. See Opinion ¶ 15.² The court also reasoned in a footnote that just because a professional's observations of a patient occur in the presence of third parties does not preclude them from remaining confidential communications.

¹ See also A.R.S. § 32-3283 ("The confidential relationship between a client and a licensee, including a temporary licensee, is the same as between an attorney and a client. Unless a client waives this privilege in writing or in court testimony, a licensee shall not voluntarily or involuntarily divulge information that is received by reason of the confidential nature of the behavioral health professional-client relationship.") (emphasis added).

² See also A.R.S. § 32-3283(A) (prohibiting disclosure of "information that [was] received by reason of the confidential nature of the behavioral health professional-client relationship"); A.R.S. § 32-3251(3) (defining "[d]irect client contact" as "the performance of therapeutic or clinical functions related to the applicant's professional practice level of psychotherapy...based primarily on verbal or nonverbal communications and intervention"); A.A.C. R4-6-1105(A) (prohibiting a behavioral health licensee from releasing or disclosing "client records or any information regarding a client" except in accordance with federal or state law or by written authorization).

2. Involuntary Commitment Requires Strict Compliance with Statutes

Second, because involuntary commitment of a person "may result in a serious deprivation of liberty,"—one of the most important and carefully guarded rights in our legal system—courts are required to strictly comply with the applicable statutes. See Opinion ¶ 6.

3. A.R.S. § 32-3283(B) Does Not Permit a Behavioral Health Professional Who Has a Confidential Relationship with a Patient to Testify as an Acquaintance Witness

If you have previously relied on this statute to allow your staff to testify in a commitment proceeding before, despite having a confidential relationship with the patient, *In Re: MH2019-004895* cautions against using it in the future. The Court of Appeals clarified that A.R.S. § 32-3283(B), which requires a licensee to "divulge to the board information the board requires in connection with any investigation, public hearing, or other proceeding," does not apply to court testimony. A court is not the Board of Behavioral Health Examiners. See Opinion ¶¶ 7-8.

4. Confidential Relationship Defined

To determine whether a confidential relationship existed, and if so, whether information "received by reason of the confidential nature" of the relationship was disclosed at the commitment hearing in *In Re: MH2019-004895*, the Court of Appeals looked to A.R.S. §§ 32-2085 and 32-3251. The court reasoned:

"The '[p]ractice of professional counseling' refers to the 'application of mental health, psychological and human development theories, principles and techniques,' to *inter alia*, (1) '[f]acilitate human development,' (2) '[m]anage symptoms of mental illness,' and (3) '[a]ssess, appraise, evaluate, diagnose and treat individuals...through the use of psychotherapy.' A.R.S. § 32-3251. 'Psychotherapy' is defined as 'a variety of treatment methods developing out of generally accepted theories about human behavior and development.' *Id.*"

See Opinion ¶ 11. The court determined that a confidential relationship did exist between the patient and behavioral health professional in this case. In reaching that decision, the court importantly noted that no testimony had been offered to show that the patient's interaction with the behavioral health professional fell outside the scope of a behavioral health professional-client relationship or that the patient consented to the professional's disclosure of information acquired during such relationship. See Opinion ¶ 13.

Even though the professional testified she did not provide "therapy or counseling," she acknowledged having a confidential relationship with the patient in which she made assessments of her symptoms of mental illness and facilitated "human development" for the patient.

See Opinion ¶ 13. The court reasoned that the definition of “practice of professional counseling,” as copied above, is very broad and that the professional’s services were included within that definition. See Opinion ¶ 13.

5. A Patient’s Reasonable Expectations of Confidentiality

According to the court, a patient would reasonably expect his or her behavioral health professional to keep confidential all information the professional receives about the client’s behavior, symptoms, and treatment, including verbal or non-verbal communications. See Opinion ¶ 17. This is consistent with the purpose of the privilege, which is to encourage a patient to be candid with his or her mental health professional and to enable the provision of appropriate treatment. See Opinion ¶ 16.

6. A Behavioral Health Professional *May* Testify as an Acquaintance Witness When the Professional Has Not Been Part of the Evaluation Process for Commitment Purposes

The court clarified that while in *In Re: MH2019-004895*, the professional/clinical liaison could not serve as an acquaintance witness for the commitment proceedings, an acquaintance witness may include medical personnel who are not part of the psychological evaluation process. See Opinion ¶ 18; see also *In re Coconino Cty. No. MH 1425*, 181 Ariz. 290, 293 (1995); *Matter of Appeal in Pima Cty. Mental Health Matter No. MH 862-16-84*, 143 Ariz. 338, 340 (App. 1984). But when a professional has a confidential relationship with the patient, the privilege must be honored.

CONCLUSION

Please do not hesitate to reach out to your Dickinson Wright counsel for any questions regarding whether a member of your medical staff may serve as an acquaintance witness in an involuntary commitment proceeding. Each case is fact-specific and depends on whether a confidential relationship has been established between the behavioral health professional and the patient.

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