

PROFESSIONAL LIABILITY UPDATE

ATTORNEY-CLIENT PRIVILEGE

By Jennifer A. Becker

***In re Elijah W.* 2013 WL 663281**

The Second District holds that a psychotherapist retained to assist counsel comes under the umbrella of the attorney-client privilege.

Elijah W. was under the jurisdiction of the juvenile court on a charge of arson. His counsel requested appointment of Dr. Catherine Scarf as an expert witness to assist by conducting psychological evaluations, assessments, and other activities related to the presentation of the case. Dr. Scarf was not a member of a panel of psychologists or psychiatrists selected for a Juvenile Competency Pilot Program in the juvenile courts (“the JCST panel”). The panel had been selected in accordance with a protocol developed by the Los Angeles County Superior Court to implement statutes addressing minors’ competency to stand trial.

The protocol provides if a minor’s competency is in question, the court will appoint an expert from the panel to perform an evaluation. The Protocol precludes incriminating statements or information emanating from an evaluation from being used against the juvenile in any proceeding. The court may shield the results of the evaluation from the court or the district attorney until a doubt as to competency arises.

Elijah’s attorney expressed concern that Elijah was so young, quiet, and withdrawn that she feared his ability to understand and cooperate. Given the high rate of developmental

immaturity of young juveniles, she believed failure to obtain the assistance of an expert would be ineffective assistance of counsel. The request was not related to competency.

Elijah’s counsel reported she had contacted the panel experts who told her they would have to report any information about child abuse or threats despite attorney-client privilege. Dr. Scarf indicated that she would only report such information to Elijah’s attorney. The trial court denied the petition as “academic” because in thousands of cases the confidentiality issue had never been raised. The trial judge knew of no case where a minor divulged child abuse or made a threat to commit a crime during a competency evaluation, and the statement was later introduced in court or prompted a report. The trial court concluded the narrow issue in competency inquiries rendered the likelihood of disclosures remote. Thus, use of protocol did not interfere with the attorney-client privilege.

On appeal Elijah asserted the protocol violated his right to effective assistance of counsel. The expert was not bound by the attorney-client privilege, and the protocol forces minors represented by court-appointed counsel to engage experts who will not abide by the

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attorney-client privilege with respect to disclosure of child abuse or threats.

The Court of Appeal disagreed with the trial court's finding that the issue is "academic" merely because it had not arisen before. It is quite possible a minor will make an incriminating statement during an examination. The Court held an appointed doctor is bound by the attorney-client privilege.

The psychotherapist-patient privilege, a statutory privilege that applies in both civil and criminal cases, protects confidential communications between a patient and a therapist. It is broadly construed in favor of the patient; exceptions are narrowly construed.

It is not absolute, and upon a proper showing psychotherapy records may be disclosed in litigation. When a patient places his or her mental or emotional condition in issue the privilege is waived. Further, there is an exception where the psychotherapist has reasonable cause to believe that the patient is in a mental or emotional condition dangerous to himself or another.

Generally there is no privilege where a court appoints a psychotherapist to examine a patient. This exception does not apply where the psychotherapist is appointed upon the request of a lawyer for a criminal defendant to provide information necessary to advise the defendant whether to enter or withdraw a plea based on insanity or to present a defense based on his or her mental or emotional condition.

California's Child Abuse and Neglect Reporting Act mandates certain professionals report knowledge or reasonable suspicion of child abuse or neglect discovered in a professional capacity.

The attorney-client privilege is embodied in statutes and Rules of Professional conduct. Evidence Code § 956.5 is a statutory exception

when an attorney learns information necessary to prevent a criminal act the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to an individual.

The constitutional right to effective assistance of counsel embraces the right to experts to assist in the defense. Equal protection demands that in some contexts a court appoint an expert to assist in defending an indigent defendant. The right to assistance includes the right to have communications made to experts remain confidential.

Elijah sought the services of an expert to assist his counsel, and thus the attorney-client privilege should apply, contrary to the conclusions of the therapists on the JCST panel that they would be compelled to reveal any disclosures made by petitioner. Dr. Scarf's position that she only need report information to Elijah's attorney is correct.

Civil liability for failure to warn another of potential imminent bodily harm was not implicated, because Dr. Scarf was being retained to assist Elijah's defense counsel, not to provide treatment to Elijah. Further, case law imposing a duty on a therapist to disclose communications when a patient may be dangerous is for the benefit of a potential victim, who has a cause of action against a therapist. This case law does not apply where an attorney seeks the assistance of a psychotherapist in the defense of a juvenile delinquency proceeding

The protection of Elijah's confidential information did not conflict with the exception to attorney-client confidentiality embodied in Evidence Code § 956.5. This section addresses the admissibility of evidence, and merely gives the attorney discretion to disclose. It does not implicate a duty of a psychotherapist assisting an attorney by requiring disclosure of threats of harm to law enforcement or child welfare authorities.

Comment: Although the expert in this case was a psychotherapist, the reasoning would apply whenever an attorney retains expert services to assist with client representation. If the expert is later designated as a trial witness, certain privileges are waived. Experts not retained to testify come under the umbrella of attorney-client privilege. It is interesting that the court held that the privilege prevails over conflicting duties imposed on mental health care providers to report certain information to law enforcement.