

Hawaii Court Rules

Rule 504.1 Psychologist-client privilege.

(a) Definitions. As used in this rule:

(1) A "client" is a person who consults or is examined or interviewed by a psychologist.

(2) A "psychologist" is a person authorized, or reasonably believed by the client to be authorized, to engage in the diagnosis or treatment of a mental or emotional condition, including substance addiction or abuse.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the client in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis or treatment of the client's mental or emotional condition under the direction of the psychologist, including members of the client's family.

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the client's mental or emotional condition, including substance addiction or abuse, among the client, the client's psychologist, and persons who are participating in the diagnosis or treatment under the direction of the psychologist, including members of the client's family.

(c) Who may claim the privilege. The privilege may be claimed by the client, the client's guardian or conservator, or the personal representative of a deceased client. The person who was the psychologist at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) Exceptions.

(1) Proceedings for hospitalization. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the client for mental illness or substance abuse, or in proceedings for the discharge or release of a client previously hospitalized for mental illness or substance abuse.

(2) Examination by order of court. If the court orders an examination of the physical, mental, or emotional condition of a client, whether a party or a witness, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the court orders otherwise.

(3) Condition an element of claim or defense. There is no privilege under this rule as to a communication relevant to the physical, mental, or emotional condition of the client in any proceeding in which the client relies upon the condition as an element of the client's claim or defense or, after the client's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

(4) Proceedings against psychologist. There is no privilege under this rule in any administrative or judicial proceeding in which the competency, practitioner's license, or practice of the psychologist is at issue, provided that the identifying data of the clients whose records are

admitted into evidence shall be kept confidential unless waived by the client. The administrative agency, board, or commission may close the proceeding to the public to protect the confidentiality of the client.

(5) Furtherance of crime or tort. There is no privilege under this rule if the services of the psychologist were sought, obtained, or used to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or tort.

(6) Prevention of crime or tort. There is no privilege under this rule as to a communication reflecting the client's intent to commit a criminal or tortious act that the psychologist reasonably believes is likely to result in death or substantial bodily harm. [L 1980, c 164, pt of §1; am L 1985, c 115, §18; gen ch 1985; am L 2002, c 134, §2]

Cross References

Privileged communications between clinical social workers and their clients, see §467E-15.

RULE 504.1 COMMENTARY

The rejected privilege rules proposed by the U.S. Supreme Court in 1972, see Rules of Evidence for U.S. Courts and Magistrates as promulgated by the U.S. Supreme Court, 28 App. U.S. Code Service, App. 6 (1975), contained no general physician-patient privilege but only a "psychotherapist-patient" privilege. The case for psychotherapists and their patients was made in the original Advisory Committee's Note:

Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his 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 relationship may well be likened to that of the priest-penitent or the lawyer-client.

Accordingly, unenacted federal Rule 504 and Uniform Rule of Evidence 503 provide the models for this rule. Both provisions include within the definition of psychotherapist "a person licensed or certified as a psychologist under the laws of any state or nation." The present rule limits the privilege to communications between a client and a psychologist licensed under the provision of Hawaii Rev. Stat. Ch. 465 (1976). In all other respects, the rule faithfully tracks the provisions of Rule 504 supra.

RULE 504.1 SUPPLEMENTAL COMMENTARY

The Act 134, Session Laws 2002 amendment (1) expands the definition of "psychologist" in subsection (a)(2); (2) conforms the definition of "confidential communication," in subsection (a) (3), and the general statement of the privilege in subsection (b), to the amended definition of "psychologist"; and (3) adds subsections (d)(5) and (d)(6), containing two new exceptions to the privilege coverage of this rule.

Subsection (a)(2)'s definition of "psychologist" is expanded to include persons "authorized, or reasonably believed by the client to be authorized, to engage in the diagnosis or treatment of a mental or emotional condition, including substance addiction or abuse." Elimination of the predecessor law's jurisdictional limitation (privilege available only to persons licensed to practice psychology under Hawaii Rev. Stat. ch. 465) conforms this privilege's coverage to that of the lawyer-client and physician-patient privileges of rules 503 and 504. And describing a qualifying psychologist's work as the "diagnosis or treatment of a mental or emotional condition" conforms this rule to rule 503 of the Uniform Rules of Evidence. The amendments to subsections (a)(3) and (b) merely incorporate the revised "psychologist" definition of subsection (a)(2).

Subsection (d)(5), entitled "Furtherance of crime or tort," bears close kinship to the counterpart crime-fraud exception to the lawyer-client privilege, rule 503(d)(1). See the 1992 supplemental commentary to rule 503, explaining that "the paramount policy of the crime-fraud exception is to thwart the exploitation of legal advice and counseling in furtherance of unlawful goals." A similar policy, applicable to psychologists' services, informs this exception.

This new exception lifts the privilege shield from communications that reflect a client's effort to exploit a psychologist's services for a criminal or tortious purpose. As the commentary applicable to Cal. Evid. Code §1018, which is similar, points out: "[T]here is no desirable end to be served by encouraging such communications."

Subsection (d)(6), entitled "Prevention of crime or tort," is intended to allow psychologists to make disclosures to avoid tort liability of the sort imposed by *Tarasoff v. Regents*, 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976) (psychotherapist's common law duty to warn foreseeable victims of a patient the therapist knows to be dangerous and likely to harm those victims). Hawaii will likely embrace *Tarasoff*, see *Lee v. Corregedore*, 83 H. 154, 925 P.2d 324 (1996), declining to create a duty to prevent a patient's suicide but recognizing a psychotherapist's duty to "disclose the contents of a confidential communication where the risk to be prevented thereby is the danger of violent assault..." Hawaii added a *Tarasoff* exception to its lawyer-client privilege in 1992, rule 503(d)(2), and the present amendment extends the same protection to psychologists.

Case Notes

When a statutory privilege interferes with a defendant's constitutional right to cross-examine, then, upon a sufficient showing by the defendant, the witness' statutory privilege must, in the interest of the truth-seeking process, bow to the defendant's constitutional rights. 101 H. 172, 65 P.3d 119.

Mother could not invoke psychologist-client privilege where counseling sessions were held pursuant to a family court order and the communications between psychologist and mother were made known to the department of human services. 8 H. App. 161, 795 P.2d 294.

The exception under subsection (d)(3) requires more than relevance; it requires a client to rely upon client's "mental or emotional condition" as an element of client's claim or defense; thus, psychologist-client privilege applied and none of the exceptions were applicable in client's request for custody of children. 112 H. 437 (App.), 146 P.3d 597.