

# “THE LAY OF THE L.A.N.”

Practical and Ethical Issues

Office of the Child’s Representative

# L.A.N. Holding

- ▣ The GAL holds the child's privilege in a D&N case when neither the child nor the child's parents have such authority.

# L.A.N. Holding

- ▣ Guidance re child: “too young or otherwise incompetent.”
  - Court in Footnote 1 declines to address the criteria courts should employ in determining whether child is privilege holder.

# L.A.N. Holding

- ▣ Guidance re parent:
  - When child is too young or otherwise incompetent, it is the parent that “typically assumes the role of the privilege holder.”
  - Parent cannot hold the privilege “when the parent’s interests as a party in a proceeding involving the child might give the parent incentive to strategically assert or waive the child’s privilege in a way that could contravene the child’s interest in maintaining the confidentiality of the patient-therapist relationship.”

# L.A.N. Holding

- ▣ Why the GAL?
  - GAL's client is best interests of child; ethical obligations as an attorney (including fiduciary duties of loyalty and confidentiality) flow from this unique definition of client.
  - Professional duties of GAL serve the privacy interest of the psychotherapist-patient privilege because GAL cannot reveal information if contrary to best interests of the child.
  - GAL's statutory duties put the GAL in an "optimal position" to understand when to assert or waive the privilege in the child's best interests.

# L.A.N. Holding

- ▣ Guidance regarding waiver
  - Waiver occurs if privilege holder “by words or conduct has expressly or impliedly forsaken his claim of confidentiality with respect to the information in question.”
  - If the scope of the waiver is readily apparent, the court may exercise its discretion and order disclosure of evidence subject to the waiver.
  - If scope is not readily apparent, court instructs holder of the privilege to compile privilege log.

# L.A.N. Holding

- ▣ Guidance regarding waiver/ disputes over scope of waiver
  - If other parties contend that privilege should not apply to any information in the privilege log, juvenile court may perform an *in camera* review of the documents.
  - After receipt of privilege log and performing any necessary *in camera* review, court determines scope of waiver by balancing competing interests surrounding disclosure.
    - ▣ Decision sets forth competing interests and other discretionary factors court may consider.

# The Privilege

Applies to “licensed psychologist, professional counselor, marriage and family therapist, social worker, or addiction counselor, a registered psychotherapist, or a certified addiction counselor”

Prevents examination “as to any communication made . . . or advice given in the course of professional employment” without consent by the client.

13-90-107(1)(g).



# The Privilege

Also prevents “any person who has participated in any psychotherapy . . . including group therapy sessions. . .” from being examined “concerning any knowledge gained during the course of such therapy without the consent of the person to whom the testimony sought relates.”

13-90-107(1)(g).

# The privilege

Applies not only to testimonial disclosure but also to pretrial discovery of communications, files, and records made during the course of treatment. *People v. Sisneros*, 55 P.3d 797 (Colo. 2002); *Clark v. District Court*, 668 P.2d 3 (Colo. 1983).

# Purpose of the Privilege

To preserve the “atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears” necessary for effective psychotherapy. *Jaffee v. Redmond*, 518 U.S. 1(1996).

# Purpose of the Privilege

“Relevance alone cannot be the test [regarding waiver/scope of waiver], because such a test would ignore the fundamental purpose of evidentiary privileges, which is to preclude discovery and admission of relevant information under prescribed circumstances.”  
*Johnson v. Trujillo*, 977 P.2d 152  
(1999)(discussing determination of waiver).

# Purpose of the Privilege

“Juvenile patients in particular require the privacy protection provided by the psychotherapist-patient privilege due to the sensitive nature of children’s mental health care.” *L.A.N. slip op.* At 8 (citing *Dill v. People*, 927 P.2d 1315 (Colo. 1996)).

# Purpose of the Privilege

- ▣ “There are about a million system people involved in my life.”
- ▣ “I can’t even get them straight.”
- ▣ “Do other kids see all these doctors and counselors?”
- ▣ “It’s hard to let go and trust anyone will help me.”

*We Interrupt*

# “L.A.N. Mines” (Unanswered Questions)

- ▣ Method/criteria for determining who is the holder of the privilege
- ▣ Relationship between HIPAA provisions allowing release of information regarding minors (individuals, personal representatives) and privilege (holder)
  - Information necessary for payment
  - Information necessary for successful support of child
  - Lack of law regarding applicability of privilege to circumscribed info/definition of circumscribed info
  - What do people do who can access but not inject info?

# “L.A.N. Mines” (Unanswered Questions)

- ▣ Releases
- ▣ Definition of pretrial disclosure in the D&N context
  - Staffings, TDMs, treatment planning meetings
- ▣ Crossover cases
- ▣ Evaluations
- ▣ Change in privilege holder
- ▣ Mature/competent children



# Solutions/Strategies

- ▣ Court orders regarding holder of privilege
  - Interim agreements?
- ▣ Stipulations regarding
  - inapplicability of privilege/ prohibition from injecting
  - readily apparent limited scope of the waiver allowing for limited information sharing
    - other evidence (fact, expert)
    - district plans/ standing orders?

# G.A.L.'s Obligations

- ▣ Seek court orders regarding determination of the privilege, limited waivers.
- ▣ When privilege holder:
  - Exercise privilege in accordance with GAL's assessment of best interests of child. Determination of best interests must include consideration of purpose of privilege and developmentally appropriate consultation with the child regarding impact of waiver.
  - When waiver is not in best interests of the child, object to sharing of information that is inconsistent with the privilege (e.g., attaching info to court reports, sharing info at staffings, CASA releases).
  - Prior to effectuating anything other than a waiver with a readily apparent limited scope, complete review of therapist's file as part of best interests/waiver assessment

Questions?

Comments?

Ideas?