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Mental Health Records: Current Issues Confronting the Practitioner

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In Alabama, the scope of discovery is relatively broad. Discovery may be conducted on relevant matters, not otherwise privileged, which are relevant to the subject matter involved in the pending action.[1] However, there are significant limitations on the disclosure of mental health records in the discovery process. The objective of this article is to provide the practitioner with a) a brief review of the evidentiary privileges protecting mental health records, b) a discussion of several important appellate decisions concerning mental health record privileges, and c) a suggested best practices for protecting mental health records from discovery.

Ala. R. Evid. 503(b) sets out the general rule of privilege with respect to "confidential communications, made for the purposes of diagnosis or treatment of the patient's mental or emotional condition, including alcohol or drug addiction, among the patient, the patient's psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family."[2] Rule 503(b) applies to persons licensed to practice medicine and licensed psychologists who are regularly engaged in the diagnosis or treatment of mental or emotional conditions, including alcohol or drug addiction.[3]

Rule 503A of the Alabama Rules of Evidence, sets out the general rule of privilege with respect to "confidential communication made for the purpose of facilitating the rendition of counseling services to the client."[4] Rule 503A applies to persons who are assisting another person, "through the counseling relationship, to develop understanding of personal problems, to define goals, and to plan action reflecting the person's interests, abilities, aptitudes, and needs as these are related to personal-social concerns, education progress, and occupations and careers."[5]

For purposes of this article, Rule 503 and Rule 503A will sometimes collectively be referred to as "mental health privileges." At the risk of oversimplification, confidential communications made to mental health professionals for the purposes of obtaining help for a mental health issue are privileged. It will not come as a surprise that there are exceptions to the general rule. An exhaustive analysis of those exceptions requires a book length treatment. However, the practitioner seeking to protect mental health records from disclosure to opposing parties must establish that: 1) the subject records contain confidential communications by, between, or among, a patient and his/her mental health professionals; 2) no exceptions to the privilege apply; and, 3) the patient has not waived the privilege.

The Courts have analyzed many of the exceptions to the mental health privileges. Of some note, the Alabama Court of Civil Appeals has held that a child is not a party to child custody matter and that the exception to the psychotherapist-patient privilege (Rule 503) relating

to custody matters was intended to apply when the mental state of the person seeking custody is at issue.[6]

Alabama Appellate Courts Have Declined to Broaden Exceptions to the Privilege.

Alabama Appellate Courts have declined to broaden the exceptions specifically set out in Rules 503 and Rule 503A. In *Ex parte Pepper*, the Petitioner asked the Court to recognize an exception to the privilege where privileged information may be relevant to the element of proximate cause.[7] The Court, citing principles of statutory construction, and public policy supporting protection of mental health records, declined to recognize an exception to the privilege. In *Ex parte Northwest Alabama Mental Health Center,* the Court refused to create "an exception to the privilege…making the privilege inapplicable when a plaintiff establishes that privileged information is 'necessary' to proving a cause of action."[8]

Confidential communications.

Both 503 and 503A protect "confidential communications." Rule 503(a)(3) states "[a] communication is 'confidential' if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family." Similarly, Rule 503A(a)(3) states "[a] communication is 'confidential' if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional counseling services to the client or those to whom disclosure is reasonably necessary for the transmission of the communication."

In *Ex parte Altapointe*, the trial court, and the Alabama Supreme Court, examined the term "confidential communications" as it is used in Rule 503.[9] Hunter Avnet was a resident at an Altapointe group home for persons with mental health needs. Hunter alleged he was assaulted by Crenshaw, another group home resident. Hunter alleged Crenshaw attacked him with a blunt object and stabbed him numerous times in the head with a knife. Hunter's father filed suit on behalf of Hunter against Altapointe alleging negligence and wantonness.

Hunter served discovery requests to Altapointe requesting, among other things: "Prior to the incident made the basis of this lawsuit, were the Defendants aware of any prior aggressive acts of K[e]rdeus Crenshaw based on any reports, incarcerations, arrests, convictions, treatments, or other similar incidences at any location?"[10] Altapointe objected to the Plaintiff's discovery request arguing that a response to the request violated the psychotherapist-patient privilege. The trial judge entered an Order compelling Altapointe to produce responsive documents. Altapointe filed a Petition for Writ of Mandamus seeking an order prohibiting discovery of information concerning Crenshaw's prior aggressive acts.

The Alabama Supreme Court denied Altapointe's Petition requesting an order prohibiting the disclosure of information concerning Crenshaw's prior aggressive acts. The Court stated that Altapointe's "argument … is based on an overbroad definition of the privilege. The psychotherapist-patient privilege is intended to protect confidential relations and

communications between a patient and his or her psychotherapist."[11] The Court noted Altapointe could have obtained knowledge of Creshaw's prior aggressive acts outside of a confidential communication with Crenshaw. The Court further noted, "[B]y definition, a patient's interactions with a third party (other than those described by the rule) are not a 'confidential communications' with a psychotherapist. Thus, it follows that a mental health provider's independent knowledge of a patient's assault on a third party cannot be considered as resulting from a confidential communication protected by the psychotherapist-patient privilege."[12]

Until the Alabama Supreme Court's decision in *Ex parte Altapointe*, practitioners and the courts seem to have given little thought to whether records maintained by a mental health provider were "confidential communications" protected by the psychotherapist-patient privilege and the counselor-client privilege. The assumption that a mental health provider's patient records were privileged (unless an exception or waiver applied) pervades many reported opinions, in part because the parties did not raise the issue on appeal. Most of the appellate decisions relating to the mental health privileges focus on the enumerated exceptions, or waiver. In representing mental health providers in this state over the past decade, it is this author's experience that trial courts broadly protect a patient's mental health records where 1) testimony from the mental health provider establishes the subject records are records prepared and/or maintained by the mental health provider, 2) none of the exceptions set out in 503 or 503A apply, and 3) there has been no waiver of the privilege. The trial courts' collective wisdom on that issue is supported by the public policy of this state and should be commended:

> Statutes such as § 34–26–2 are intended to inspire confidence in the patient and encourage him in making a full disclosure to the physician as to his symptoms and condition, by preventing the physician from making public information that would result in humiliation, embarrassment, or disgrace to the patient, and are thus designed to promote the efficacy of the physician's advice or treatment. The exclusion of the evidence rests in the public policy and is for the general interest of the community. See 81 Am.Jur.2d *Witnesses* § 231 at 262 (1976); *Annot.,* 44 A.L.R.3d 24 *Privilege, in Judicial or Quasi-judicial Proceedings, Arising from Relationship Between Psychiatrist or Psychologist and Patient* (1972).
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> "[A] psychiatrist must have his patient's confidence or he cannot help him. 'The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. * * * It would be too much to expect them to do so if they knew that all they say—and all that the psychiatrist learns from what they say—may be revealed to the whole world from a witness stand.' "

> *Taylor v. United States,* 222 F.2d 398, 401 (D.C.Cir.1955), quoting Guttmacher and Weihofen, *Psychiatry and The Law* (1952), p. 272.[13]

However, *Ex parte Altapointe* signals a turning point in the application of mental health privileges, and a more rigorous application of the privileges. For parties seeking to protect mental health records from disclosure, it will no longer be enough to simply assert the privilege and present an affidavit from the mental health provider stating the subject records were prepared in the course of providing mental health care to the patient.

Using the discovery request at issue in *Ex parte Altapointe* as an example, consider if Altapointe learned of the patient's violent tendencies by receiving notice from a criminal court concerning criminal proceedings against the patient. That information may then be recorded in the patient's file, but would not have been obtained through confidential communications with the patient. Likewise, if the patient assaulted another patient in the waiting room of at an out-patient mental health clinic run by Altapointe, that information may be noted in the patient's file, but would not have been obtained through confidential communications with the patient.

The aforementioned examples, and the example set out in *Ex parte Altapointe*, are clear. However, applying the term "confidential communication" to communications by, and actions of, profoundly intellectually disabled persons and persons with severe mental illness is a much more difficult task. Persons for whom the privileges are designed to protect, may not comprehend the technical concept of confidentiality described in *Ex parte Altapointe*. Such persons may not have the appropriate insight to determine when, or when not, to communicate concerning his/her mental health condition. Questions concerning whether the person intended the communication to be confidential (or not), or whether the person knowingly, or unknowingly, made a communication in the presence of a third person are made all the more difficult to analyze in connection with persons who have profound intellectual disabilities or serious mental illnesses.

Additionally, depending upon the mental health care provider, and whether the care is provided in-patient, out-patient, or residential care, a mental health care provider's "file" on a particular patient may contain general demographic information, financial information, or medical records relating to the treatment of purely medical conditions, dietary and nutrition records, and records concerning what the patient likes to watch on television. All of the aforementioned records may be intertwined with, and inextricable from, what the Court in *Ex parte Altapointe* considers confidential communications protected by the privilege. So, applying a narrow interpretation of "confidential communication" would require extensive testimony from the mental health provider—going line by line in the mental health record in some cases—parsing out what is, and is not, a confidential communication. Getting further into the weeds, the mental health professional would need to answer questions such as: 1) Did you establish at the outset of the psychotherapist-patient relationship that all communications by, between, and among you and the patient would be confidential and would be used in connection with providing mental health services, or is there some ambiguity in that respect? 2) What, if any, of your records represent verbatim statements made by the patient, in confidence?, 3) What records, if any, contain your confidential communications and clinical assessments of the patient, and 4)

What records contain publically available information, or information you obtained outside of your relationship with the patient? Arguably, the mental health professional would have no need for "outside" information about the patient, nor would the mental health professional receive such information, but for the psychotherapist-patient relationship. But, even the above-suggested process may not completely satisfy *Ex parte Altapointe* without testimony from the patient concerning the patient's intent to convey confidential information.

In camera inspections.

On occasion, parties seeking privileged mental health records request, in the alternative, that the trial court conduct an *in camera* inspection of the mental health records. This seemingly magnanimous tactic presents itself as an easy and reasonable choice to the trial judge (*i.e.*, "Judge we don't want you to give it to us outright, take a look at the records, keep the opposing party honest…and then you decide if we ought to get the records").

Ex parte University of South Alabama offers some guidance on the propriety of *in camera* inspections.[14] In that case, a former university employee sued the university, and a university student, arising out of the university's failure to reappoint the employee to her position. During discovery, the employee issued a subpoena seeking the student's mental health records. The student objected to the subpoena, and both the student and her mental health provider filed motions to quash and motions for protective orders. The trial court denied the motions and entered an order denying the motion to quash, and requiring the mental health provider to submit of the records to the trial court for in camera review. The student filed a Petition for Writ of Mandamus seeking an order directing the trial court to quash the subpoena for her mental health records.

The Alabama Supreme Court held the trial court exceeded the scope of its discretion in ordering the production of the student's mental-health records for *in camera* review because: 1) the student demonstrated her mental-health records were privileged, 2) the employee failed to demonstrate the records fell within an exception to the privilege, 3) the employee failed demonstrate the student waived the privilege, and 4) the employee failed to establish the subject records may contain information not protected by the privilege.[15]

The former employee did not argue that the mental health records were privileged; however, she simply argued that production of the records for *in camera* review was consistent with the Court's decision in *Ex parte Etherton*, 773 So.2d 431 (Ala. 2000). In *Ex parte Etherton*, the Court held that production of mental health records for *in camera* review was appropriate because the mental health records were perhaps the plaintiff's "only source of relevant evidence, or information that [would] lead to admissible evidence, in support of her claims."[16]

The Court in *Ex parte University of South Alabama* soundly rejected the former employee's reliance on *Ex parte Etherton* in support of her argument. The Court noted that neither the main opinion nor the special writing in *Ex parte Etherton* was by majority. The Court also observed that even if *Ex parte Etherton* had precedential value, the former employee had not demonstrated the production of the student's mental-health records for *in camera* review was necessary. The Court noted the former employee had not established the student's mental health

records contain information outside of the materials protected by the psychotherapist-patient privilege. Finally, the Court also cites *Ex parte Northwest Alabama Mental Health Center,* wherein the Court specifically refused to create an exception to the psychotherapist-privilege where privileged information is 'necessary' to prove a cause of action.[17]

Conclusion.

The practitioner seeking to protect confidential mental health records from disclosure should establish the following:

1) Establish through testimony from the mental health provider that the subject records reflect confidential communications made by, between, and among, the patient and the patient's mental health providers for the purpose of providing mental health care;

2) Establish that no exceptions to the privilege apply to the subject records;

3) Establish that the patient has not waived the privilege; and,

4) Establish through testimony from the mental health provider that the subject records do not contain any information not obtained through confidential communications.

In contrast, assuming that no exceptions apply and waiver is not applicable, the practitioner seeking disclosure of mental health records would be advised to narrowly tailor the discovery requests seeking only information the mental health provider learned outside of the confidential communications by, between or among provider and patient. Additionally, depositions of the patient's mental health professionals would be helpful. Establishing that the patient's mental health records contain information not solely obtained through "confidential communications" would support production of said records or, at minimum, a motion for *in camera* inspection.

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[1] Ala. R. Civ. P. 26(b).
[2] Ala. R. Evid. 503(b).
[3] *Id. See also* Ala. Code § 34-26-2.
[4] Ala. R. Evid. 503A(b).
[5] Ala. R. Evid. 503A(a)(6)(A). *See also* Ala. Code. § 34-8A-21.
[6] *Ex parte Johnson*, 219 So. 3d. 655 (Ala. Civ. App. 2016).
[7] 794 So. 2d 340 (2001).
[8] 68 So. 3d 792, 799 (Ala. 2011).
[9] 249 So. 3d 1108.
[10] *Id*. at 1103.
[11] Id. (emphasis in original).
[12] Id. at 1115.
[13] *Ex parte Rudder*, 507 So. 2d 411, 413 (Ala. 1987).
[14] 183 So. 3d 915 (Ala. 2015).

[15] *Id.*
[16] 773 So.2d at 436.
[17] 68 So.3d at 799.