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INTEREST OF AMICI CURIAE

Amici Mental Health Legal Advisors Committee (MHLAC), the Center for Public Representation (CPR), and the Disability Law Center (DLC) have a longstanding interest in the rights of individuals subject to civil commitment under the state mental health code and each organization plays a direct role in protecting the rights of individuals in the mental health system. The decision in this case will have a substantial impact on the individuals whom amici serve.

MHLAC was established by the General Court in 1973 under the jurisdiction of the Supreme Judicial Court and with the explicit "duty . . . to assist and advise indigent patients and residents in . . . mental health . . . facilities of the commonwealth." G.L. c. 221, § 34E.

CPR is a national public interest law firm with offices in Northampton and Newton that advocates for the rights of individuals with disabilities. The Center's attorneys have represented hundreds of individuals in civil commitment hearings, have participated as members of the District Court Department's Mental Health and Mental Retardation

Committee and have testified in the Legislature on dozens of occasions regarding proposed amendments to the mental health code.

DLC is a private non-profit organization, is Massachusetts' designated protection and advocacy agency for people with disabilities, pursuant to federal statutory authority. See, e.g., 42 U.S.C. § 10801 (people with mental illness), 42 U.S.C. § 15001 (people with developmental disabilities), 29 U.S.C. § 794e (other persons with disabilities). DLC regularly conducts outreach and intake in state psychiatric facilities, representing clients subject to civil commitment on a variety of human rights and treatment related issues. On many occasions, DLC has participated in amicus briefs filed before the Massachusetts Appeals Court or the Supreme Judicial Court.

Attorneys from the three amici organizations collectively have many years of experience representing people with psychiatric disabilities and representing individuals subject to civil commitment proceedings.

STATEMENT OF THE ISSUE

Does the "patient-psychotherapist privilege" established at G.L. c. 233, § 20B, and similar statutory privilege provisions, preclude the admission into evidence in commitment proceedings under G.L. c. 123 of statements made by a patient to a psychotherapist, and opinions based upon such statements, absent a knowing and intelligent waiver of such privilege?

STATEMENT OF THE CASE

Amici adopt the Statement of the Case and the Statement of the Facts submitted by the Appellant, K.I.

SUMMARY OF ARGUMENT

1. By rendering the patient-psychotherapist privilege at G.L. c. 233, § 20B inapplicable to civil commitment proceedings, the decision below is inconsistent with relevant authority, which strikes a balance between the personal liberties and safety concerns implicated by the question before this Court. Argument at 4 – 5.

2. The Appellate Division failed to pay sufficient heed to what courts have characterized as the "massive" deprivation occasioned by civil commitment Part I (A) at 6 – 7.

3. The decision below is also inconsistent with the high level of protective procedures deemed required in this and like circumstances, which includes protection against unwitting statements used in support of confinement. Part I (B) at 8 – 9.

4. Similarly, the Appellate Division failed to follow or adequately distinguish prior decisions of this Court and the SJC governing the § 20B privilege, specifically the applicability of the exceptions in subsections (a) and (b). Part I (C) at 9 – 15.

5. Its holding that subsection (a) (excepting certain exigent circumstances) *always* trumps the privilege in civil commitment proceedings, and that subsection (b) (creating an exception to the privilege only when the patient receives a prior warning of non-confidentiality) *never* applies, turns the analysis of prior cases on its head. Part I (C) at 12 – 15.

6. The courts in these cases explicitly avoid negating the privilege, which would undermine important policy considerations and raise serious

constitutional concerns, by strictly limiting the subsection (a) exception and holding that subsection (b) is controlling in almost all relevant circumstances. Part I (C) at 15 – 16.

7. The concern expressed by the Court below, that applying the privilege to civil commitment proceedings will deny needy persons treatment, fails to give adequate credence to the necessity of trust in a therapeutic relationship. Part II at 1 – 17.

8. The fact that confidentiality is fundamental to the practice of psychotherapy is evidenced by statutory requirements (Part II (B) (1) at 18 – 20), as well as ethical standards and guidelines (Part II (B) (2) at 20 – 25).

9. The importance of confidentiality in a therapeutic relationship is further demonstrated by the opinions of surveyed mental health practitioners and patients, who largely believe the patient-psychotherapist privilege essential. Part II (C) at 25 - 28.

10. Contrary to the view of the Court below, the patient-psychotherapist privilege does not unduly impede civil commitment in appropriate cases. Part III 28-29.

11. Adequate evidence regarding the need for confinement for treatment is generally available from other sources, thus surveyed legal practitioners do not view the privilege as a significant impediment to civil commitment. Part III (A) (1) at 29 - 30.

12. Additionally, overreliance on patient statements to examining clinicians, relative to other sources of evidence, is unwise in any case, given that unreliable information is often elicited in the course of a psychiatric interview. Part III (A) (2).

13. Concern expressed by the Court below that the privilege will impede commitment of persons who need treatment is belied by the prevalence of the application of the privilege to civil commitment proceedings in other jurisdictions and the experience in these states, as confirmed in research. Part III (B) (1) at 33 - 35.

14. In fact, in Massachusetts, a high rate of commitment petitions are approved, even after the implementation of District Court standards suggesting that the privilege is applicable. Part III (B) (2).

ARGUMENT

The Appellate Division, despite guidance suggesting a different result,[1] held that a patient's statements made in the course of a clinician's evaluation and in advance of a petition for involuntary civil commitment are not protected by the psychotherapist-patient privilege and are therefore admissible. The decision would permit patients reasonably expecting confidentiality in psychotherapeutic interactions, and who are not warned otherwise, to be confined in a locked mental hospital based on their own statements alone. The Court's interpretation of Massachusetts law governing the psychotherapist-patient privilege does not give due regard to the grave deprivation occasioned by civil commitment. Its decision stands in sharp contrast to the balancing of interests reflected not only in judicial precedent but also in statute, regulation, and ethical principles governing confidentiality in

[1] See Commonwealth of Massachusetts, Administrative office of the District Court, Standards of Judicial Practice: Civil Commitment and Authorization of Medical Treatment for Mental Illness (rev. Dec. 2011, eff. Jan. 3, 2012) ("District Court Standards") (Addendum, at 4), Standard 5:04 If the Appellate Division had followed the guidance it would have excluded the evidence that justified Appellant's commitment to a mental hospital. See note 17.

patient-therapist relationships. These sources of authority and guidance stress that confidentiality is essential to the development of a trusting relationship that enhances the efficacy of treatment for mental illness.

Amici ask this Court to reverse this decision, which, if followed in the District Courts, would upset a reasonable balance, struck in well-established civil commitment law and practice, between personal liberties and safety concerns.[2]

I. IN ITS FAILURE TO SUFFICIENTLY CONSIDER THE MASSIVE DEPRIVATION OF LIBERTY OCCASIONED BY CIVIL COMMITMENT, DEEMED BY COURTS TO WARRANT STRONG PROCEDURAL PROTECTIONS, INCLUDING THE PSYCHOTHERAPIST-PATIENT PRIVILEGE, THE DECISION OF THE APPELLATE DIVISION IS INCONSISTENT WITH SETTLED LAW.

If affirmed, the decision below will completely eviscerate the protection of G.L. c. 233, § 20B in civil commitment proceedings.[3] The decision is inconsistent with relevant precedent.

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[2] See the dissent of Justice Pierce in the case at bar, *Walden Behavioral Care v. K.I.*, No. 13-ADMS-10004 (Nov. 15, 2013) ("Decision below"), at Record Appendix (hereinafter, "RA") 14, acknowledging the need for "a balancing of two important interests."

[3] G.L. c. 233, § 20B (see Addendum at 1) permits a person subject to "any court proceeding" to block the admission into evidence of "any communication,

A. Involuntary civil commitment constitutes a significant deprivation of liberty and has continuing serious ramifications subsequent to release.

Courts have persistently stressed the seriousness of consequences arising from civil commitment. The SJC twice characterized the deprivation as "massive."[4]

"The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement."[5] In evaluating the need for procedural protections, courts in this jurisdiction and others

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wherever made, between said patient and a psychotherapist relative to the diagnosis or treatment of the patient's mental or emotional condition." Subsection (a) creates an exception for communications disclosed by psychotherapists when "there is a threat of imminently dangerous activity by the patient against himself or another person…" The Court below held that (a) is *always* applicable in civil commitment proceedings. Decision below, at RA 8 - 13. Conversely, the Court held that the condition on admissibility established by subsection (b), that the person's voluntary consent be evidenced by a prior warning to the effect that statements made in the course of a psychotherapists' examination may be used to support commitment, is *never* applicable in proceedings under G.L. c. 123, §§ 7 & 8. *Id.,* at RA 5–8. The net effect is stated by the Court clearly: ". . . the patient-psychotherapist privilege does not apply to civil commitment proceedings." *Id.,* at RA 13.

[4] *Commonwealth v. Barboza*, 387 Mass. 105, 111 (1982), quoting *Commonwealth v. Travis*, 372 Mass. 238, 249 (1977); see also *Humphrey v. Cady*, 405 U.S. 504, 509 (1972)(civil commitment entails "massive curtailment of liberty").

[5] *Vitek v. Jones*, 445 U.S. 480, 492 (1980).

have pointed to the "indisputable" stigma associated with civil commitment,[6] resulting in the "loss of future opportunities" after release.[7] Arguably, "the interests in avoiding civil commitment are at least as high as those of persons accused of criminal offenses;" thus the "resulting burden on the state to justify civil commitment must be correspondingly high."[8]

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[6] *Id.*; see also *Addington v. Texas*, 441 U.S. 418, 425-426 (1979); *Lessard v. Schmidt*, 349 F.Supp. 1078, 1091 (E.D.Wis.1972), *vacated and remanded on other grounds, 414 U.S. 473, 379 F. Supp. 1376 (1974), vacated and remanded on other grounds, 95 S. Ct. 1943 (1975)*; *Barboza,* 387 Mass. at 112; *In the Matter of Laura L.,* 54 Mass.App.Ct. 853, 861 (2002).

[7] *Lessard,* 349 F.Supp. at 1090.

[8] *Id.*; see also *Superintendent of Worcester State Hospital v. Hagberg*, 374 Mass. 271, 276 (1978)(extending to mental health civil commitment cases the holding of *In re Andrews*, 368 Mass. 468, 489 (1975) requiring proof beyond a reasonable doubt to support civil commitment of sexually dangerous persons, while rejecting contention that less stringent procedures should apply because of lessening stigma in society); *In re Andrews*, 368 Mass. at 489 (1975) endorsing reasoning of California Supreme Court that stigma from civil commitment as a sexually dangerous person "is at least as great as that flowing from a criminal conviction;" holding that same standard of proof should apply).

B. Due to the seriousness of the potential deprivation, courts have ensured strong procedural protections for persons subject to civil commitment.

In evaluating the level of procedural protections warranted in a given circumstance, courts "balance the interests of the individual affected, the risk of erroneous deprivation of those interests and the government's interest in the efficient and economic administration of its affairs."[9] Applying this analysis to civil commitment, courts have mandated stringent due process protections.

The essentials of due process – including adequate notice, an adversary hearing before an independent decision maker, and the availability of appointed counsel for indigent persons – have long applied to civil commitment proceedings.[10] In a series of cases, the courts of this Commonwealth augmented and clarified these rights.[11]

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[9] *Barboza,* 387 Mass. at 112, quoting *Thompson v. Commonwealth*, 386 Mass. 811, 817 (1982)(petition for release from a mental hospital under G.L. c. 123 § 9(b)).

[10] *Vitek*, 445 U.S. at 485; see also G.L. c. 123, §§ 3 – 8.

[11] See *Andrews,* 368 Mass. at 482, describing due process protections including the right under G.L. c. 233, § 20B(b) to keep privileged (i.e. excluded from evidence) communications made to court-appointed

Importantly, the SJC held that the highest possible proof standard – beyond a reasonable doubt - applies in civil commitment proceedings. The Court likened the level of due process required to that of criminal proceedings.[12]

The privilege against involuntary disclosure of information gained in an interview in contemplation of petitioning for civil commitment is one important aspect of the assemblage of due process rights protecting against unfair and unwarranted deprivations of liberty.[13]

C. The Appellate Division failed to follow or adequately distinguish precedent governing the applicability of G.L. c. 233, § 20B and the exceptions contained therein.

Consistent with the respect afforded to the individual interests implicated by the serious deprivation of civil commitment, Massachusetts appellate courts have interpreted § 20B to protect persons from involuntarily providing evidence

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psychotherapists, absent a showing that a warning was given that the communication would not be privileged.

[12] See note 9 and corresponding text; but see *Barboza,* 387 Mass. 105, 112 (declining to extend certain procedural rights, such as trial by jury, to commitment proceedings).

[13] This right is included among those enumerated in *Andrews*. See note 12.

resulting in their confinement.[14] Exceptions to the privilege in § 20B subsections (a) and (b), under these holdings, do not obviate the privilege except in exigent circumstances or by voluntary waiver. This Court and the Supreme Judicial Court balanced the need for informed psychiatric review in commitment cases with respect for individual rights, while at the same time avoiding the question of whether failure to afford the § 20B privilege would raise constitutional violations.[15]

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[14] See *Commonwealth v. Lamb*, 365 Mass 265, 267-268 (1974) (trial court erred in admitting testimony regarding defendant's statements to psychiatrist when no warning provided that statements could be used to support commitment as a sexually dangerous person); *DYS v. A Juvenile*, 398 Mass. 516, 525-527 (1986) (psychiatrist's testimony regarding statements of juvenile in proceedings to extend his commitment past his 18th birthday were admitted into evidence in violation of § 20B when no warning was given under subsection (b), even though examination was not court-ordered); *Laura L.*, 54 Mass. App. Ct. at 857-862 (trial court in civil commitment action erred in failing to consider if waiver of privilege under § 20B was truly knowing and voluntary, given indications to the contrary).

[15] The SJC in *Lamb*, at 269, said that to hold as did the Court below would raise "substantial constitutional questions on the procedures prescribed by G.L. c. 123A," opting instead to avoid "grave doubts upon that score." The Appellate Division did not acknowledge any even potential constitutional ramifications, mischaracterizing *Lamb* warnings as "a purely statutory construct." Decision below, at RA 6.

The Appellate Division declined to follow these cases. In declaring the psychotherapist-patient privilege inapplicable in civil commitment proceedings, the court below interpreted subsection (a) expansively and subsection (b) narrowly.[16] All the relevant appellate cases, however, employ the opposite analysis.

This contrast is best exemplified by the *Lamb* case. There, the SJC reversed a commitment order under G.L. c. 123A because of the admission of damaging psychiatric testimony elicited from a patient in the course of a court-ordered examination where the examiner failed to warn that statements may be used in support of commitment. The Court, "harmonizing" the two exceptions to § 20B, held that subsection (b) "must govern exclusively in these circumstances."[17] Moreover, the scope of subsection (a) was limited only

[16] See note 3. The Appellate Division also departed from the guidance of District Court Standard 5:04 which states that relevant case law from "other types of proceedings" than civil commitment under G.L. c. 123, "has apparently limited this exception to situations where the patient is (or is about to be) at large and is not before the court or in State custody, and therefore the § 20B(a) exception is probably not available in civil commitment and [G.L. c. 123,] §8B proceedings." District Court Standards, *supra* note 1, at 61.

[17] *Lamb*, 365 Mass at 267-68.

to circumstances where a patient is "not institutionalized or is about to be discharged from an institution," and there is an "imminent threat that a person who should be in custody will instead be at large."[18] Thus the Court refused to adopt the Appellate Division's encompassing interpretation of subsection (a) to avoid negating subsection (b) and its protection against involuntary incrimination.[19] The Appellate Division took precisely the approach rejected by the SJC.

Although the Court below attempted to distinguish *Lamb,* it did not argue that the liberty deprivation was less severe or need for procedural protection less urgent for persons facing mental health commitment than for those facing commitment as sexually dangerous persons. Rather, the Court held that the prerequisite warning under the exception in subsection (b) is not necessary because the examination in question here,

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[18] *Id.* at 268. The Appeals Court adopted this construction in *Laura L.* 54 Mass. App. Ct. at 859. Amici endorse the manner in which Appellant construes the courts' harmonization of the two exceptions: Essentially, that *Lamb* warnings are required at the point when the focus for a hospitalized person shifts from an ongoing treatment relationship to assessment of the person's need for an extended period of commitment.

[19] *Lamb*, 365 Mass. at 269; *Laura L.*, 54 Mass. App. Ct. at 860.

unlike that in *Lamb*, was not court ordered. But the SJC in the *DYS* case characterized this same argument as "anomalous" and "without merit," holding, in reliance on *Lamb* and § 20B itself, that the warnings "do not depend on whether the Commonwealth chooses to interview a person on its own initiative or decides to seek court permission."[20]

The Appellate Division's attempt to distinguish *DYS v. A Juvenile* misses the point of the SJC's holding. It interprets the Court's directive as motivated merely to prevent prosecutors from circumventing § 20B. But the SJC's reasoning does not lend itself to such a narrow reading. The SJC focused on the seriousness of the deprivation involved in juvenile sentence extension actions and the need for procedural protection, finding "no reason" not to apply the same "safeguards" as in the *Lamb* case.[21]

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[20] *DYS*, 398 Mass. at 526. The Court's holding makes perfect sense given how § 20B is constructed. Subsection (b) is an exception to the rule. It does not apply unless its requisites are in place. If it doesn't apply, the rule applies. The Appellate Division's holding that the rule (the privilege) is negated by virtue of the failure to satisfy a requisite element of an *exception* (that the examination be "court ordered") is indeed "anomalous."

[21] *Id*.

The Appellate Division's justification for its failure to follow appellate precedent regarding the § 20B(a) exception is equally unpersuasive. The Court gave exaggerated weight to apparent statutory ambiguity concerning the circumstances to which subsection (a) applies; specifically, whether the person subject to examination is confined in a hospital when the exception comes into effect.[22] The Court also vastly expands the meaning of the word "imminent," as used in *Lamb*, to justify the disclosure in civil commitment proceedings, without prior

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[22] Decision below, at RA 9. Subsection (a) excepts from the privilege evidence obtained "in the course of [a psychotherapists'] diagnosis or treatment of the patient" when it suggests that "there is a threat of imminently dangerous activity by the patient against himself or another person," and the evidence is disclosed for "the purpose of *placing or retaining* the patient in such hospital." (emphasis added) Since a person may only be *retained* in a hospital if already confined, and subsequent language requires that the privilege be observed "after the patient is in said hospital," the Appellate Division found the provision "makes no sense." *Id*. While not a model of clarity, the provision can be reasonably read. The language "after the patient is in said hospital" refers to persons detained from outside the institution, to whom, since the imminence of any threat has at that point subsided, the privilege is restored. There is no reason that the legislature would not have the same intention for persons once "retained." In any case, the SJC in *Lamb*, resolved any ambiguity by limiting the § 20B(a) exception to circumstances "when there is an imminent threat that a person who should be in custody will instead be at large," either because the person is not arrested or released.

warning, of any communications between psychotherapist and confined patient at any time.[23]

There is no basis upon which to distinguish precedent. The SJC in *Lamb* and this Court in *Laura L.* interpreted the same provision, but did not perceive any ambiguity justifying a broad interpretation of the subsection (a) exception. Indeed, the Courts narrowly construed the exception, in important part, to avoid the natural result of the decision below; that is, to "render nugatory the important policy objective of the statute evinced by the notice requirement in exception (b)."[24]

The Court below, quoting the description the SJC gave to its own interpretation of § 20B in *Lamb*, claims that it achieved a reconciliation that is most "effectual and harmonious."[25] But the Appellate

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[23] Decision below, at RA 9–10. The Court below held that the standards governing civil commitment and the (a) exception were co-extensive. *Id.* Section 20B never applies to civil commitment and evidence flowing from the psychotherapeutic relationship is always admissible. See note 3. Anything a patient says to a clinician in what might be a long course of confinement and treatment could be used in proceedings to continue civil commitment.

[24] *Lamb*, 365 Mass. at 269; *Laura L.*, 54 App. Ct. at n.9, quoting *Lamb.*

[25] Decision below, at RA 13. *Lamb*, 365 Mass. at 268-69. *See also Laura L.*, 54 App. Ct. at n. 9 (following *Lamb*).

Division turned *Lamb* on its head. The SJC's interpretation of § 20B reflects a deeper understanding of the interests involved and how best to balance them. Because the Appellate Division ignored that interpretation, the decision below must be reversed.

II. THE APPELLATE DIVISION FAILED TO GIVE PROPER REGARD TO THE NECESSITY FOR A TRUSTING THERAPEUTIC RELATIONSHIP IN MENTAL HEALTH TREATMENT AND EXAGERATED THE NEED TO ADMIT STATEMENTS TO PSYCHOTHERAPISTS INTO EVIDENCE.

The Appellate Division expressed concern that individuals will not be committed and, thereby, will not receive care and treatment, if psychotherapists cannot rely on communications from patients at a commitment hearing.[26] The Court, however, fails to recognize the fundamental importance of a trusting therapeutic relationship between clinician and patient for effective care and treatment.

Research on the role of privilege and confidentiality suggests that these protections are essential to the clinical relationship. The Supreme Court understood the need to respect the critical importance of an effective therapist-patient

[26] Decision below, at RA 13.

relationship when it created a psychotherapist-patient privilege in federal court proceedings in 1996:

> Effective psychotherapy … depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.[27]

A. Confidentiality is fundamental to the practice of psychotherapy.

The provisions in G.L. c. 233, § 20B closely mirror professional ethical standards regarding patient confidentiality. Not surprisingly, there is widespread agreement among psychotherapists that communications with patients must be kept confidential.[28] To be effective, psychotherapy requires patient confidence and the potential for open

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[27] *Jaffee v. Redmond*, 518 U.S. 1, 2 (1996).

[28] Hagve, The Psychotherapist-Patient Privilege in Washington: Extending the Privilege to Community Mental Health Centers, 58 Wash. L. Rev. 565, 569 (1983) (citing Group for the Advancement of Psychiatry, Report No. 45 92 (1960) which was relied upon in developing the draft of the federal psychotherapist-patient privilege, Proposed Rule 504*).*

disclosure of information by the patient.[29] The assurance that information will not be shared outside the treatment relationship is important for two reasons: first, information divulged during treatment is often highly personal; and second there is still stigma attached to seeking psychotherapeutic treatment.[30]

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[29] The Development of Evidentiary Privileges in American Law, 98 Harv. L. Rev. 1530, 1542 (1985).

[30] *Id*. at 1542-1543. In fact, when due process protections were first developed to, in part, formalize the taking of testimony during the commitment hearing, "[t]here followed a strong backlash from clinical professionals…. Physicians vehemently objected to the 'criminalization' of the commitment process, which often forced them to testify against their patients, weakening therapeutic alliances…" Miller & Fiddleman, Involuntary Civil Commitment in North Carolina: The Result of the 1979 Statutory Changes, 60 N. C. L. Rev. 985, 991 (1981-1982).

B. Professional ethical standards guarantee confidentiality and require clinicians to inform patients of any limitations on that confidentiality at the outset of the relationship.

1. The Commonwealth's statutory provisions and case law regarding confidentiality for psychologists, social workers psychiatrists are strong evidence of the critical importance of confidentiality to the therapeutic relationship.

Psychologists, social workers and psychiatrists licensed in Massachusetts must keep all information that they acquire in connection with providing services to patients confidential, subject to certain limited exceptions. For psychologists and social workers, this requirements is codified in statute and regulation,[31] while for psychiatrists, it is established by case law.[32] The statutes governing psychologists and social workers clarify that confidential information includes the fact, circumstances, findings and records relating to the services.[33]

The regulations for these clinicians also have specific requirements for informing patients of the

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[31] G.L. c. 112, § 129A & 251 Code Mass. Regs. § 1.11 (2014)(psychologists); G.L. c. 112, § 135A & 258 Code Mass. Regs. §§ 22.00 (2014)(social workers).
[32] *Alberts v. Devine*, 395 Mass. 59, 69 (1985).
[33] G.L. c. 112, § 129A; G.L. c. 112, § 135A.

limits of confidentiality.[34] If the psychologist is administering psychological evaluation, a court-ordered evaluation, or psychological testing, the psychologist must inform the patient about all confidentiality limitations before the evaluation or testing begins.[35]

Ethical and statutory requirements regarding therapist-patient confidentiality are consistent with the research on the effect of ensuring confidentiality and privilege on the development of therapeutic treatment relationships.

[34] Unless there are documented *substantial* clinical reasons for withholding the information, psychologists must inform the patient of the limits of confidentiality by the end of the first professional session. 251 Code Mass. Regs. § 1.11(2)(a)(2014).

[35] 251 Code Mass. Regs. § 1.11(2)(a)(2014). Similarly, a social worker must inform a patient of his or her confidentiality rights and the limitations and exceptions to such rights no later than the end of their first encounter or consultation, unless sound professional practice dictates otherwise. 258 Code Mass. Regs. § 22.06 (2014).

2. Confidentiality is central to the professional ethical standards for psychologists and psychiatrists, suggesting that clinicians understand confidentiality to be fundamental to their clinical relationships and in no way compromising of their ability to treat.

The ethics standards of both the American Psychiatric Association and the American Psychological Association, which govern the behavior of licensed psychiatrist and psychologists respectively, give paramount consideration to maintaining patient confidentiality.

Both associations' ethical standards require that their licensed professionals maintain patient confidentiality.[36] Both sets of standards have been in effect for many years, and have undergone multiple reviews and revisions.[37] The standards of both

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[36] American Psychiatric Ass'n, Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry (2013 ed.) (hereinafter, "Principles of Medical Ethics"), at http://psychiatry.org/practice/ethics/resources-standards (last viewed Apr. 7, 2014), Section 4 Principle; American Psychological Ass'n, Ethical Principles of Psychologists and Code of Conduct (2010) (hereinafter, "Ethical Principles of Psychologists"), at http://www.apa.org/ethics/code/index.aspx?item=1 (last viewed Apr. 7, 2014), Standard 4.

[37] Principles of Medical Ethics, *supra* note 36, Copyright page (seventeen revisions since 1973); Ethical Principles of Psychologists, *supra* note 36, History and Effective Date, at

associations are mandatory for their respective professional members.[38]

Both sets of standards emphasize that confidentiality of therapist-patient communication is essential to mental health treatment. Thus, psychiatrists "shall respect the rights of patients," and "may release confidential information only with the authorization of the patient or under proper legal compulsion."[39] Likewise, psychologists have "a primary obligation … to protect confidential information."[40] Both must inform patients of their rights regarding confidentiality, the limitations, and the effects of waiver. For example, psychiatrists must keep the patient "fully apprised of the connotations of waiving

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http://www.apa.org/ethics/code/index.aspx?item=14 (ten revisions since 1953) (last viewed Apr. 7, 2014).

[38] Principles of Medical Ethics, *supra* note 36, at 1, n.3; Ethical Principles of Psychologists, *supra* note 36, Introduction and Applicability. The Ethical Principles of Psychologists also include aspirational general principles, at http://www.apa.org/ethics/code/index.aspx?item=3, (last viewed Apr. 7, 2014), Principle E, Respect for People's Rights and Dignity, directs psychologists to respect the "rights of individuals to privacy, confidentiality, and self-determination."

[39] Principles of Medical Ethics, *supra* note 36, Section 4 Principle, Annotations 1 & 2.

[40] Ethical Principles of Psychologists, *supra* note 36, Standard 4.01.

the privilege of privacy."[41] Similarly, psychologists must discuss with patients the limits of confidentiality and the foreseeable uses of revealed information.[42]

The standards for each profession give substantial deference and importance to confidentiality in setting out the few circumstances in which communications may be disclosed. Psychiatrists are directed to refuse disclosure even when ordered by a court to do so: "When the psychiatrist is in doubt [as to whether or not to comply with the court order], the right of the patient to confidentiality and, by extension, to unimpaired treatment should be given priority."[43] And, while a psychiatrist *may* reveal patient confidences when "the risk of danger is deemed to be significant," he or she is not required by the standards to do so.[44] For psychologists, disclosure requires appropriate

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[41] Principles of Medical Ethics, *supra* note 36, Section 4 Principle, Annotation 2.
[42] Ethical Principles of Psychologists, *supra* note 36, Standard 4.02. This obligation is also imposed by the standards requiring informed consent, Standards 3.10, 10.01.
[43] Principles of Medical Ethics, *supra* note 36, Section 4 Principle, Annotation 9.
[44] Principles of Medical Ethics, *supra* note 36, Section 4 Principle, Annotation 8.

consent, unless disclosure is mandated or permitted by law.[45] Moreover, the circumstances in which disclosure might be legally permitted are narrow.[46]

The psychiatric association requires that "[a] physician shall, while caring for a patient, regard responsibility to the patient as paramount."[47] Further, "[w]hen significant relationships exist that may conflict with patients' clinical needs, it is especially important to inform the patient or decision maker about these relationships and potential conflicts with clinical needs."[48] Thus, psychiatrists are expected, under this discrete standard, to maintain confidentiality in nearly all situations and when they cannot, to inform the patient of any such

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[45] Ethical Principles of Psychologists, *supra* note 36, Standard 4.05(a), (b).

[46] The circumstances include disclosure to provide services, obtain consultation, protect an individual from harm, or obtain payment. Ethical Principles of Psychologists, *supra* note 36, Standard 4.05(b).

[47] Principles of Medical Ethics, *supra* note 36, Section 8 Ethical Standard. Similarly, Annotation 2 of the Section 4 Principle states: "[w]hen the psychiatrist's outside relationships conflict with the clinical needs of the patient, the psychiatrist must always consider the impact of such relationships and strive to resolve conflicts in a manner that the psychiatrist believes is likely to be beneficial to the patient."

[48] Principles of Medical Ethics, *supra* note 36, Section 8 Ethical Standard, Annotation 3.

limitations.[49] Psychologists, too, are required to exhibit fidelity and responsibility towards those with whom they work, including by establishing trusting relationships.[50]

The above-described ethical principles of the American Psychiatric and American Psychological Associations reveal that these professions believe not only that confidentiality can co-exist with treatment but also that it is *required* for treatment. During the many years that these standards have been in place, psychiatrists and psychologists have complied and routinely provided patients with information about the

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[49] In addition to its Principles of Medical Ethics, the American Psychiatric Association's Practice Guidelines on Psychiatric Evaluation of Adults dictate that "privacy and confidentiality are an integral component of any psychiatric encounter . . . In general, the default position is to maintain confidentiality unless the patient gives consent to a specific intervention or communication." American Psychiatric Ass'n, Practice Guidelines on Psychiatric Evaluation of Adults, Second Edition (hereinafter "Practice Guidelines"), at http://psychiatryonline.org/content.aspx?bookid=28§ionid=2021669 (last viewed Apr. 7, 2014), Section V.A. The psychiatrist would only be justified in some release of information in an "emergency situation" to address the safety of the patient and others, and in that case, only to the release of "necessary information about the patient to medical personnel." *Id.*

[50] Ethical Principles of Psychologists, *supra* note 36, General Principle B, at http://www.apa.org/ethics/code/index.aspx?item=3 (last viewed Apr. 7, 2014).

right to confidentiality and any limitations on that right. These warnings have not inhibited the ability to treat patients and have perhaps enhanced that ability, as the studies in the following section will suggest.

C. Research reveals that confidentiality and privilege are essential features of effective mental health treatment.

Multiple studies examining the significance of privilege in the relationship between psychotherapist and patient demonstrate that effective treatment requires that clinician-patient communications be protected against disclosure.[51]

One such study found that Massachusetts psychiatrists recognize the value of a psychotherapist-patient privilege. Shortly before the passage of c. 233, § 20B,[52] a survey of Massachusetts psychiatrists found that 92% believed a physician-patient privilege should be established by law.[53] The

[51] Courville, Rationales for the Confidentiality of Psychotherapist-Patient Communications: Testimonial Privilege and the Constitution, 35 Hous. L. Rev. 187, 198 (1999).
[52] Inserted by St. 1968, c. 418.
[53] Suarez & Balcanoff, Massachusetts Psychiatry and Privileged Communication, 15 Arch. Gen. Psychiatry 519, 621 (1966).

psychiatrists were then asked in what contexts there should be an exception to the privilege. Majorities of respondents favored an exception in only three situations: when the patient consented to the testimony, when the examination was by a court-appointed psychiatrist and the examinee is notified that there is no privilege, and in the course of a malpractice suit by the patient against the psychiatrist. Of those psychiatrists responding to the question of whether there should be an exception to privilege in the context of commitment proceedings, 61% said "no."[54]

Studies of patient perceptions reveal that patients believe their communications with their therapists will be protected from revelation. For example, studies in Texas[55] and California[56] suggested that patients believe that communications with their therapists are private, and that the ability to have private conversations is fundamental to a therapeutic

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[54] *Id*. at 621.
[55] Shuman & Weiner, The Privilege Study: An Empirical Study: An Empirical Examination of the Psychotherapist-Patient Privilege, 60 N. C. L. Rev. 893 (1982).
[56] Wise, Note, Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of *Tarasoff*, 31 Stan. L. Rev. 165 (1978).

relationship.[57] Moreover, commentators interpreting the studies have observed that patients would have been less likely to share information if they did not believe that their disclosures were confidential.[58]

This position is borne out by the research data.[59] For example, in the Stanford survey, nearly 80% of therapists believed that a patient is less likely to divulge "certain information" if they think their

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[57] Shuman & Weiner, *supra* note 55, at 931, Table 2, Question 2 (for a majority of patients surveyed, confidentiality was a consideration when first thinking about therapy; over 90% of surveyed patients relied on the psychiatrist's ethics and the principle of confidentiality in believing that the communications were private); Wise, *supra* note 56, at 183 (most therapists surveyed thought that patients will withhold information important to treatment if they believe the therapist may breach confidentiality), 184 (most therapists surveyed believe that their patients assume that communications are absolutely confidential).

[58] Courville, *supra* note 51, at 199-200.

[59] Studies that do not support the premise that a typical patient would refuse to consult with or withhold information from a clinician if not assured of confidentiality are flawed. Klinka, It's Been a Privilege: Advising Patients of the *Tarasoff* Duty and Its Legal Consequences for the Federal Psychotherapist-Patient Privilege, 78 Fordham L. Rev. 863, 901-902 (2009)(flaws include a failure to distinguish between patient reactions to out-of-court disclosure and patient reactions to judicially compelled disclosure and the difficulty in determining what truly motivates a person to act in a certain way); see also Courville, *supra* note 51, at 200 (noting limitations of the Texas survey).

therapist might have to share the information.[60] Shuman and Weiner, authors of the Texas study, concluded that "[t]he therapist's threat to disclose or his actual disclosure, whether or not it is voluntary, causes a small number of premature terminations from therapist and probably deters a large percentage of these people from seeking further help."[61]

III. THE APPLICATION OF PRIVILEGE TO INVOLUNTARY CIVIL COMMITMENT AND SIMILAR PROCEEDINGS DOES NOT HINDER THE ABILITY OF COURTS TO COLLECT AMPLE EVIDENCE TO ORDER COMMITMENT WHEN APPROPRIATE.

The Court below opined that the result of observing the § 20B privilege in civil commitment proceedings – that patients may assert it and refuse to permit the introduction into evidence of testimony based on confidential communications – is "unacceptable."[62] The Court exaggerates the importance of testimonial evidence in these cases.

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[60] Wise, *supra* note 56, at 176 & n. 63; *see also* Comment, Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privilege Communication Doctrine, 71 Yale L. J. 1226, 1255 (1962) (five of every seven people reported that they would be less likely to make a full disclosure to a counselor without a guarantee of confidentiality).
[61] Shuman & Weiner, *supra* note 55, at 926.
[62] Decision below, at RA 12.

A. The criteria for civil commitment can be met using evidence from a range of sources, not only from the statements of the patient.

1. The evidence to support an order of civil commitment is available from sources other than the patient's own testimony.

In fact, evidence to prove the elements for civil commitment is available from sources other than the patient's own testimony. First, for patients that have been held on a psychiatric unit, there has been ample opportunity for hospital staff persons to observe the behavior, interactions and communications of the patient during the period of confinement leading up to the commitment hearing. Second, petitioner may well have access to other sources of testimony about the patient's behavior on the ward or in the community. As one observer has written, "Testimony as to the acts of the defendant, or his failure to sustain himself, may be evidence of mental illness."[63] For this commentator, such testimony is actually preferable:

> Reliance on this … type of evidence would also make it less likely that the trier of fact would abdicate to the opinion of a psychiatrist, and would also focus the attention of the trier of fact upon the acts of the defendant. It is these acts with

[63] Fielding, Compulsory Psychiatric Examination in Civil Commitment and the Privilege Against Self-Incrimination, 9 Gonz. L. Rev. 117, 165 (1974).

which the state truly has a legitimate interest.[64]

Third, it is likely that in a civil commitment proceeding, the information that one could obtain from a patient is available from other sources.[65]

Fourth, even if, in theory, information may be excluded, in practice there is some evidence in the research literature that the effect of respecting the privilege is minimal. A Yale Law Journal study of the psychotherapist-patient privilege found that judges and lawyers agreed nearly unanimously that the privileged communications doctrine did not threaten to disrupt the administration of justice significantly.[66]

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[64] *Id.*
[65] See, e.g., District Court Standards, *supra* note 1, at 4:03, Commentary (testimony may be taken from "medical professionals and other staff members as well"); see also G.L. c. 123, § 16(d) (in forensic proceedings under G.L. c. 123, § 16, the district attorney's office that prosecuted the respondent's criminal case, while not a party, has the right "to be notified of ... and . . . to be heard" at the commitment hearing). This apparently includes an independent right to offer evidence under usual evidentiary rules. District Court Standards, *supra* note 1, 4:03, Commentary.
[66] Yale L. J., *supra* note 60, at 1261; *see also* Shuman & Weiner, *supra* note 55, at 927 (in authors' Texas survey of judges handling domestic relations cases about the effect of the psychotherapist-patient privilege on the availability of evidence, while all the judge agreed that the information was not available elsewhere, four of seven judges believed

2. Clinical examinations often elicit unreliable information.

The Appellate Division said that testimony based on what patients tell psychotherapists is "the most critical evidence."[67] However, testimony relying on patient statements to psychotherapists is no more reliable than other second-hand testimony, although it is often afforded a higher degree of credibility because it comes in through an expert and may appear cloaked in an aura of scientific fact-finding.

Evidence suggests that clinical examinations often elicit unreliable information.[68] There are multiple potential reasons for unreliability. A patient may misunderstand the context of a discussion; another may seek to avoid further inquiry by simply answering indiscriminately; another may try to conform

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that the testimony in question was not necessary for accurately resolving the case).

[67] Decision below, at RA 12-13.

[68] Wesson, The Privilege Against Self Incrimination in Civil Commitment Proceedings, 1980 Wis. L. Rev. 697, 710 (1980). The potential for a patient to provide misinformation can have a substantial impact on the outcome of a civil commitment proceeding. As one element of commitment is dangerousness to self or others, and as predications of dangerousness are largely based on the patient's past actions, a patient's inaccurate account may have a devastating impact. *Id.* at 720.

answers to what seems to be the examiner's expectation.[69] In some cases, cognitive limitations result in inaccuracy.[70]

One might believe that psychiatrists are trained to detect statements that are likely inaccurate. But the process itself may be problematic. The techniques by which interviewers elicit information may be flawed when "an examiner, because of expectations, biases or interviewing style, provokes inaccurate or misleading responses from his subject."[71] And, while misinformation can be challenged on cross-examination, a lawyer who did not attend the evaluation session is at a disadvantage when trying to argue that the basis of the psychiatrist's conclusions is in accurate.[72]

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[69] *Id.* (citing multiple studies).
[70] *Id.*
[71] *Id.* at 711.
[72] *Id.* at 712.

B. Across the nation and within Massachusetts, civil commitments petitions continue to be filed and approved, unimpeded by the right of patients to privileged communications.

1. Most U.S. states have created a psychotherapist-patient privilege and only a few have an exception to privilege for involuntary hospitalization, yet civil commitment rates are unaffected by the privilege.

Most states have established a psychotherapist-patient privilege, and most of these states have applied that privilege to the civil commitment context. A 2000 study found that of the forty-five states that credentialed professional counselors, forty-four have a statute or rule of evidence granting privileged communication to the counselor-client relationship.[73] Of these forty-four states, only thirteen have established an exception to privilege for involuntary hospitalization.[74]

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[73] Glosoff, Herlihy & Spence, Privileged Communication in the Counselor-Client Relationship, 78 Journal of Counseling & Development 454, 455 (2000); see also Shuman & Weiner, *supra* note 55, at 907-911 (chart of state statutes on privilege).

[74] Glosoff, Herlihy & Spence, *supra* note 72, at 459. As in Massachusetts, involuntary commitment is typically allowed in other states when a mental disorder has been diagnosed, when an individual is show to be dangerous to themselves or others, and when hospitalization is considered the least restrictive treatment available. *Id*.

Yet, thoughtful state and national analyses of the effect of incorporating due process protections into the civil commitment process affirm that the availability of civil commitment as a treatment option is not compromised by such protections. For example, a detailed review of commitment practice in Wisconsin's counties, soon after the federal court ruling in *Lessard*,[75] found that the "dire prediction that *Lessard* would lead to hundreds of mentally ill persons 'dying with [their] rights on'" had not seen come to pass, even in an urban county that incorporated "both the letter and the spirit of *Lessard* into civil commitment procedure."[76]

2. In Massachusetts, where the expected practice is that District Court judges consider the protection of the psychotherapist-patient privilege as applicable to civil commitment proceedings, civil commitment petitions continue to succeed.

In the roughly twelve year period since the November 2000 enactment of state civil commitment reform, District Court judges allowed, on average,

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[75] 349 F. Supp. 1078.

[76] Zander, Civil Commitment in Wisconsin: The Impact of *Lessard v. Schmidt*, 1976 Wis. L. Rev. 503, 559 (1976).

sixty-three petitions for civil commitment per month, or 89% of all petitions that they heard.[77] The rate did not abate following the January 2012 implementation of the District Court Standards for civil commitment; in 2012, the average number of petitions allowed per month was seventy-five, or 90% of all petitions heard.[78] The drafters of Standard 5:04 interpret case law as not permitting use of the 20B(a) exception to the psychotherapist-patient privilege.[79] If the Appellate Division is correct that application of the privilege will reduce the ability of courts to appropriately commit persons with mental illness, and there was even partial adherence to the Standards, this position should be reflected in a lower rate of commitment after the implementation of the Standards. The rate is actually higher, not lower, suggesting that the Appellate Division's concern is unfounded.

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[77] Commonwealth of Mass., Dept. of Mental Health, Report on the Impact of Chapter 249 of the Acts of 2000: An Act to Reform the Civil Commitment Process for Persons with Mental Illness (2012 Annual Report), at 3-4 (Addendum at 16).

[78] *Id.* at 3. The overall number of petitions heard is increasing as well, from an average of seventy-one in the period from 2000-2012, to eighty-three in 2012. *Id.*

[79] See District Court Standards, *supra* note 1, and note 16.

CONCLUSION

For the reasons stated the decisions of the Appellate Division and trial court should be reversed.

Respectfully submitted by their attorneys,

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Jennifer Honig
BBO # 559251

Phillip Kassel
BBO # 555845
MENTAL HEALTH LEGAL ADVISORS COMMITTEE
24 School Street, 8th Floor
Boston, MA 02108
(617) 338-2345

____

Robert Fleischner
BBO # 171320
CENTER FOR PUBLIC REPRESENTATION
22 Green Street
Northampton, MA 01060
(617) 965-0776

____

Stan Eichner
BBO # 543139
DISABILITY LAW CENTER
14 Beacon Street, 9th Floor
Boston, MA 02108
(617) 723-8455

CERTIFICATION OF COMPLIANCE WITH RULES OF COURT PURSUANT TO RULE 16(k)

I, Jennifer Honig, certify that the brief of amici complies with the rules of court regarding the filing of briefs.

April 10, 2014

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Jennifer Honig
BBO # 559251
MENTAL HEALTH LEGAL ADVISORS COMMITTEE
24 School Street, 8th Floor
Boston, MA 02108
(617) 338-2345

ADDENDUM

STATUTES

G.L. c. 233, § 20B 1

OTHER

Commonwealth of Massachusetts, Administrative Office of the District Court, Standards of Judicial Practice: Civil Commitment and Authorization of Medical Treatment for Mental Illness (rev. Dec. 2011), pp. i, 1-3, Standard 4:03, and Standard 5:04..................4

Commonwealth of Massachusetts, Department of Mental Health, Report on the Impact of Chapter 249 of the Acts of 2000: An Act to Reform the Civil Commitment Process for Persons with Mental Illness (2012 Annual Report)..16

CERTIFICATE OF SERVICE

I, Phillip Kassel, hereby certify that two copies of the above document have been served upon Stan Goldman, Esq., 38 Hartshorn Street, Reading, MA 01867, attorney for Appellant, Diane Geraghty Hall, Esq., Geraghty Hall & Ready, LLP, 62 Derby Street, Suite 7, Hingham MA 02043, attorney for Appellee by first class mail.

April 11, 2014

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Phillip Kassel