

Child Abuse Reporting – An Exception?

Avoiding Liability Bulletin - April 2013

... In an interesting case in California, an appeals court has ruled that a defense attorney in a juvenile court matter may hire his or her own psychotherapist (as an expert) to examine the minor defendant and to assist the attorney in the defense of the case, and that the attorney-client privilege covers the communications between the minor and the psychotherapist, rather than the arguably more porous psychotherapist-patient privilege. The case was a juvenile court proceeding, wherein a wardship petition was filed alleging that the minor had committed several “criminal” offenses under the Penal Code. The defense attorney sought a court order of appointment of the psychotherapist designated by the defense. To the extent that this decision is not overruled, the decision likely has wider application (in California) than to juvenile court proceedings.

The court ruled that the attorney may be selected by the defense, and that the psychotherapist need not be one of the mental health practitioners on the court lists for use as experts in certain litigation involving competency and related forensic issues. Those psychotherapists believed that they were duty-bound to report suspected child abuse or act pursuant to the duty to protect the intended victim of the patient’s dangerousness in “Tarasoff situations.” The court ruled that the defense can hire its own qualified expert to assist counsel in conducting reasonably necessary psychological evaluation, assessments, and other activities related to the presentation of the case. All reports were to go to the defense attorney who sought the court order of appointment of the psychotherapist.

The central question that arose related to the applicability of the psychotherapist’s child abuse reporting duties, as well as the duty that exists under the famed Tarasoff v. Regents University of California decision (the California Supreme Court decision in 1976 regarding dangerous patients and the duty of psychotherapists to protect intended victims), for the psychotherapist appointed to assist the defense. As stated above, most of the psychotherapists on the court-appointment lists were of the belief that they were under the “Tarasoff duty” and that their obligation to report child abuse was in existence – even if they were appointed by the court to provide evaluation services at the request of the defense.

The Court ruled that the communications between the defendant and the psychotherapist hired by the defense were covered by the attorney-client privilege - not the psychotherapist-patient privilege. The Court said that the attorney client privilege would extend to any disclosures made by the defendant to the psychotherapist on the “defense team.” The court likened the defense’s hiring of the defense expert (the psychotherapist) as the hiring of a translator or other expert witness hired by the defense – also covered by the attorney-client privilege. The Court stated that the belief of the psychotherapists on the court’s panel that they would have to report child abuse, if they had been appointed to assist the defense, was incorrect.

The psychotherapist hired as a defense expert would, of course, report any suspicion of child abuse or any situation requiring action to protect a third party to the lawyer representing the defendant. We need not here discuss the ethical or legal duties of an attorney under such circumstances in a particular state.

Author:

Richard Leslie