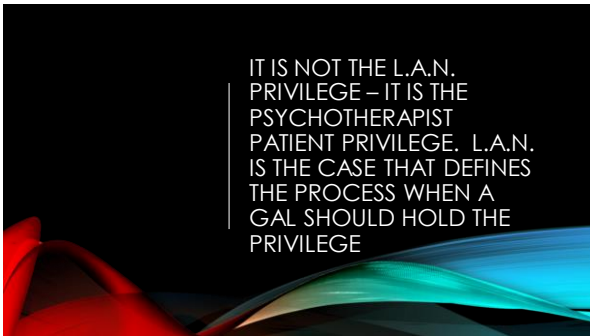
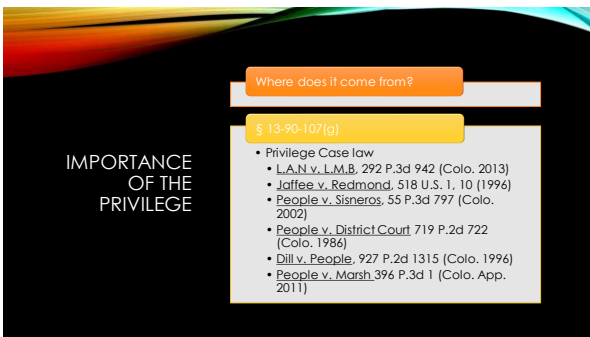




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2



3

- (g) A licensed psychologist, professional counselor, marriage and family therapist, social worker, or addiction counselor, a registered psychotherapist, a certified addiction counselor, a psychologist candidate registered pursuant to [section 13-90-107\(I\)\(2.5\)](#), a marriage and family therapist candidate registered pursuant to [section 13-90-107\(I\)\(3\)](#), a licensed professional counselor candidate registered pursuant to [section 13-90-107\(I\)\(4\)](#), a social worker, or a person described in [section 13-90-107\(I\)\(5\)](#), shall not be examined without the consent of the licensee, certificate holder, registrant's candidate, or person or the licensee, certificate holder's, registrant's, candidate's, or person's advice given in the course of professional employment; nor shall any secretary, stenographer, or clerk employed by a licensed psychologist, professional counselor, marriage and family therapist, social worker, or addiction counselor, a registered psychotherapist, a certified addiction counselor, a psychologist candidate registered pursuant to [section 13-90-107\(I\)\(2.5\)](#), a marriage and family therapist candidate registered pursuant to [section 13-90-107\(I\)\(3\)](#), a licensed professional counselor candidate registered pursuant to [section 13-90-107\(I\)\(4\)](#), or a person described in [section 13-90-107\(I\)\(5\)](#), be examined without the consent of the employer of the secretary, stenographer, or clerk concerning any fact, the knowledge of which the employee has acquired in such capacity; nor shall any person who has participated in any psychotherapy, conducted under the supervision of a person authorized by law to conduct such therapy, including group therapy sessions, be 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(I)(G)

4

LAN V. LMB,
292 P.3D 942
(COLO. 2013)

- **Holdings:** The Supreme Court, [Berg, J.](#), held that:
 1. psychotherapist's notes and records relating to treatment of young child adjudicated neglected and dependent were protected by psychotherapist-patient privilege;
 2. GAL and not Department of Human Services (DHS), or juvenile court, held child's psychotherapist-patient privilege;
 3. GAL partially waived privilege to extent of contents of psychotherapist's letter to parties that GAL disseminated to parties; and
 4. as matter of first impression, in determining scope of GAL's waiver of privilege, GAL would prepare privilege log describing communications subject to privilege, after which juvenile court would conduct in camera review of log and communications, then balance interests in maintaining privilege against interests supporting disclosure.

5

JAFFEE V.
REDMOND,
518 U.S. 1,
10 (1996)

- Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is "rooted in the imperative need for confidence and trust... [and]... sustained by a principle for private citizens can otherwise proceed successfully on the basis of a physical separation, objective information supplied by the patient, and the trust of objective, well-trained psychotherapists [sic] control, diagnosis, and an atmosphere of confidence and trust in which the patient is willing to make a full 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 involving diagnosis and treatment may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." [444 U.S. 134, 144 \(1980\)](#) (quoting [American Psychiatric Association](#) observed in 1972 when it recommended that Congress recognize a psychotherapist privilege as part of the proposed Federal Rules of Evidence, a psychiatrist's reply to the public policy).
- "It is completely dependent upon [the patient's] willingness and ability to talk freely. This makes it difficult if not impossible for a psychotherapist to function without having access to a stream of confidentially and, indeed, privileged communication. Where there may be exceptions to the general rule... there is wide agreement that confidentiality is a sine qua non for the successful psychotherapeutic treatment." [72 ABA](#) [Committee's "41 Rules to Govern the Practice of Psychology" \(1972\)](#) (quoting [American Psychiatric Association](#) observed in 1972 when it recommended that Congress recognize a psychotherapist privilege as part of the proposed Federal Rules of Evidence, a psychiatrist's reply to the public policy).
- By protecting confidential communications between a psychotherapist and her patient from involuntary disclosure, the proposed privilege thus serves important privacy interests.
- ["Our cases make clear that an asserted privilege must state 'what \[the\] public good' is."](#) [Hickman v. Totten](#), 437 U.S. 198, 204 (1978). Thus, the purpose of the attorney-client privilege is to encourage full and frank communication between attorney and client and thereby promote broader public interests in the observance of law and administration of justice." [Id.](#) And the spousal privilege, as modified in [Barnes](#), is justified because it "furthers the important public interest in marital harmony." [Hickman v. Totten](#), 437 U.S. 198, 204 (1978). See also [Upjohn v. United States](#), 443 U.S. 115, 125 (1979) (noting that the psychotherapist-patient privilege serves the public good by fostering the privacy of a therapeutic relationship and thereby reducing the effects of emotional or emotional problems. The mental health of our citizenry, no less than its physical health, is a public good of tremendous importance).

6

**PEOPLE V.
SISNEROS, 55
P.3D 797
(COLO. 2002)**

- We hold that the psychologist-patient privilege applies and shields the documents requested by Defendant from discovery even in camera review by the trial court. Once the privilege attaches, the privilege holder must waive, explicitly or implicitly, the privilege before Defendant can obtain discovery. The victim's testimony at the preliminary hearing did not constitute a waiver of the privilege. Since there was no waiver, the subpoena duces tecum should have been quashed. The trial court did not have discretion to conduct an in camera review of the documents. The rule to show cause is made absolute.
- The mere threat of disclosure destroys the sanctity of the psychologist-patient relationship.

7

**PEOPLE V. DISTRICT COURT 719 P.2D
722 (COLO. 1986)**

- As we have noted, the right of a party to cross-examine adverse witnesses must in some circumstances bow to other considerations.³ There is a strong public policy interest in encouraging victims of sexual assault to obtain meaningful psychotherapy. The defendant's constitutional right to confrontation is not so pervasive as to place sexual assault victims in the untenable position of requiring them to choose whether to testify against an assailant or retain the statutory right of confidentiality in post-assault psychotherapy records. Accordingly, we conclude that where, as here, the victim has not waived the privilege afforded her by section 13-90-107(1)(a), the defendant is not entitled to examine the victim's post-assault psychotherapy records or to have the trial court review such records in camera on the basis that the records might possibly reveal statements of fact that differ from the anticipated testimony of the victim at trial.

8

**DILL V. PEOPLE,
927 P.2D 1315
(COLO. 1996)**

- In view of the fact that the psychologist-client privilege is also designed to encourage a patient to seek counseling with the assurance that all communications will be kept confidential, see *People v. District Court*, 719 P.2d at 726, a conclusion that section 13-90-107(1)(a) negates the psychologist-client privilege for post-report therapeutic communication would be inconsistent with the legislature's intent to shield a child victim from further harm. We therefore agree with the court of appeals that "the victim's psychologist-patient privilege afforded to her by § 13-90-107(1)(a) was not abrogated by statute with respect to ongoing treatment" and that the trial court did not err in denying discovery of the psychologist's notes with respect to ongoing treatment sessions with the child. *Dill*, 904 P.2d at 1317.

9

PEOPLE V. MARSH 396 P.3D 1 (COLO. APP. 2011)

The nature of a conflict between the interests of a parent and of his or her child may preclude the parent from waiving the child's psychologist-patient privilege.

Mother could not waive daughter's psychologist-patient privilege so as to allow defendant to question daughter regarding daughter's report from session with psychologist's report from session with daughter; mother had a conflict of interest given that defendant was her father and was accused of sexually assaulting daughter, which put mother's natural affection and affinity for her child and her father in direct conflict.

10

PURPOSE OF PRIVILEGE

- This is a child's right to have privacy and to process their trauma knowing they have absolute confidentiality. The case law supports that position.
- What are the other purposes of the privilege?



11

WHAT HOLDING THE PRIVILEGE DOES AND DOESN'T MEAN

- Doesn't mean consent to treat
- Privilege vs. consent to treat
- Implied waivers
- Limited Waivers



12

WHO HOLDS THE PRIVILEGE

- Child
- Appoint Counsel
- Parent
- GAL
- L.A.N. V. L.M.B

"We can tell him about Santa Claus now, but wait a couple years before we tell him about the IRS."

13

Why you shouldn't ignore the privilege

Findings for privilege holder

Considerations on when to file

DETERMINATION OF PRIVILEGE HOLDER

14

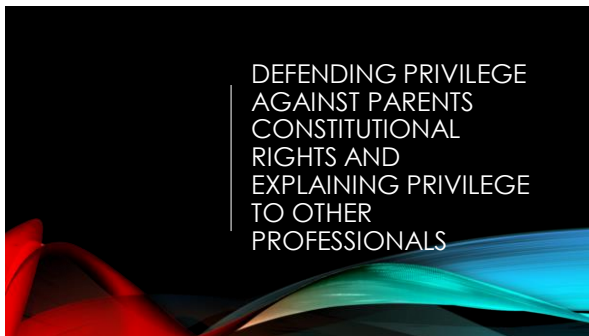
WAIVERS

- What constitutes a waiver
- Legal strategies in litigation to avoid waivers
- Consulting with child before waiving
- When is waiver readily apparent
- What information can be shared with team without waiving
- Limited waivers

15



16



17



18
