



COLORADO OFFICE OF
THE CHILD'S
REPRESENTATIVE

The Psychotherapist- Patient Privilege

*Advocating for the Right to Privacy for
Children and Youth*



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Session Overview

- Privilege Basics
- The Supreme Court's Holding in *L.A.N. v. L.M.B.*
- Developments after *L.A.N. v. L.M.B.*
- Recent issues and questions
- Reminder of OCR resources



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Privilege Basics



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What is the privilege?

- Prevents examination “as to **any communication made . . . or advice given**” without consent by the client.
- Applies to “licensed psychologist, professional counselor, marriage and family therapist, social worker, or addiction counselor, a registered psychotherapist, or a certified addiction counselor.”

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



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When does it apply?

- 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).



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What is its purpose?

- 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).



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Why does it matter to children and youth?

- “**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., 292 P.3d at 947 (citing *Dill v. People*, 927 P.2d 1315 (Colo. 1996)).



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L.A.N. v. L.M.B., 292 P.3d
942 (Colo. 2013)



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Applicability to D&N Proceedings

- Applies unless statutorily abrogated or waived.



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Who holds the child's/youth's privilege?

- The GAL holds the child's privilege in a D&N case when:
 - The **child** is too young or otherwise incompetent to hold the privilege;
 - The child's interests are adverse to those of their **parents**.



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The child

- 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.



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The parent

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.**”



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Why the GAL?

- **Ethical responsibilities** (loyalty, confidentiality) flow to best interests of 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.
- GAL is **consistently available** to hold the child's privilege.

The Court explicitly rules out the department and the juvenile court as potential privilege holders.



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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."



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Scope of waiver and privilege logs

- 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.
- After review of privilege log/*in camera* review of documents, court determines scope of considering the **competing interests surrounding disclosure**.



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Competing interests

- Patient's privacy, potential damage to trust for therapist and therapeutic process generally.
- Need to obtain information essential to claim or defense.
- Disclosure can eliminate surprise, bring forth relevant evidence, simplify issues, promote expeditious resolution of the case.
- Juvenile court may benefit from the information.

In weighing these interests, juvenile court must keep in mind its **overarching duty to further the best interests of the child**.



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Developments after *L.A.N. v. L.M.B.*



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Questions/Concerns after *L.A.N.* decision

- Access to information relevant to best interests determination
- Intersection between confidentiality and privilege
 - releases
- Implications for meetings, staffings, other communications
- Representation for youth recognized as privilege holder
- Other case types
- Parents' rights



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Post-LAN litigation

- *In re People in Interest of J.P.*, 538 P.3d 337 (Colo. 2023)
 - *Privilege logs, sufficiency of description*



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Current Issues



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Current Issues

- Implications of CFY
- Application to non-D&N cases
- Waiver
- Consent to treatment v. privilege
- Assessments, evaluations



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Implications of HB 22-1038



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Other case types

- Domestic Relations
- Probate
- Delinquency



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Waiver issues

- Attorney/privilege holder waiver decisions
- Avoiding inadvertent waivers of privilege by youth
- Managing waivers in litigation



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Privilege v. authorization

- Distinction between privilege and confidentiality
- Authorization to treat
- Authorization to release records



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Assessments

- Court-ordered assessments may not be protected by the privilege
- QRTP



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OCR Resources

- The GRID
- Litigation toolkit
- Staff attorneys
- Appellate Litigation support list
- Second chair



Questions?

