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## A Surprise: Montana's Mental Health Provider Privileges, Or Lack Thereof

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# A surprise: Montana's mental health provider privileges, or lack thereof

Last month's Evidence Corner, about the doctor-patient privilege, dealt with the protection of communications made by a patient to obtain physical health care. This month, I discuss the existence and limits of the corollary privilege for mental health practitioners.

As with the doctor-patient privilege, Montana's state court privilege is different from the federal version. In both systems, communications made for mental health enjoy stronger privilege than doctor-patient communications. Surprisingly, however, Montana's privilege is far more limited than the federal psychotherapist privilege. It may be time for a statutory extension of the state's mental health privilege; for sure, Montana's social workers should advise their psychotherapy clients that their sessions are not covered by any evidentiary privilege.

## THE FEDERAL PSYCHOTHERAPIST PRIVILEGE

Let's be clear: Justice Antonin Scalia doesn't need no stinkin' shrink. He apparently gets his counseling from his mother, or from his bartender, neither of whom is entitled to any sort of communications privilege, and that is good enough for him:

When is it, one must wonder, that *the psychotherapist* came to play such an indispensable role in the maintenance of the citizenry's mental health? For most of history, men and women have worked out their difficulties by talking to, *inter alios*, parents, siblings, best friends, and bartenders — none of whom was awarded a privilege against testifying in court.

*Jaffee v. Redmond*, 518 U.S. 1, 22, 116 S. Ct. 1923, 1934, 135 L. Ed. 2d 337 (1996) (Scalia, dissenting).

Seven other members of the Court outvoted him, however, and the majority opinion in this case established a federal evidentiary privilege for communications between a psychotherapist and a patient, pursuant to FRE 501's injunction that federal privileges are to be determined by the federal courts, rather than by legislative or rule-making bodies.<sup>1</sup> Justice Stevens, writing for the Court, articulated the public policy in favor of protection of

<sup>1</sup> FRE 501, which I have discussed at more length in previous columns about other privileges, provides:

### RULE 501. PRIVILEGE IN GENERAL

The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

the disclosures made by a person seeking mental health services:

...the question we address today is whether a privilege protecting confidential communications between a psychotherapist and her patient "promotes sufficiently important interests to outweigh the need for probative evidence...." ... Both "reason and experience" persuade us that it does.

....

Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is "rooted in the imperative need for confidence and trust." *Ibid.* Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, 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. As the Judicial Conference Advisory Committee observed in 1972 when it recommended that Congress recognize a psychotherapist privilege as part of the Proposed Federal Rules of Evidence, a psychiatrist's ability to help her patients

"is completely dependent upon [the patients'] willingness and ability to talk freely. This makes it difficult if not impossible for [a psychiatrist] to function without being able to assure ... patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule..., there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment.'" Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972) (quoting Group for Advancement of Psychiatry, Report No. 45, Confidentiality and Privileged Communication in the Practice of Psychiatry 92 (June 1960)).

By protecting confidential communications between a psychotherapist and her patient from involuntary disclosure, the proposed privilege thus serves important private interests.

Our cases make clear that an asserted privilege must also “serv[e] public ends.” *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981). ... The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.

In contrast to the significant public and private interests supporting recognition of the privilege, the likely evidentiary benefit that would result from the denial of the privilege is modest. If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation. Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access — for example, admissions against interest by a party — is unlikely to come into being. This unspoken “evidence” will therefore serve no greater truth-seeking function than if it had been spoken and privileged.

That it is appropriate for the federal courts to recognize a psychotherapist privilege under Rule 501 is confirmed by the fact that all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege. (Citations and footnotes omitted)

*Jaffee v. Redmond*, 518 U.S. 1, 9-12, 116 S. Ct. 1923, 1928-29, 135 L. Ed. 2d 337 (1996).

Once the *Jaffee* majority had decided to recognize some form of psychotherapist privilege, its next task was to define the class of mental health professionals to whom the privilege would extend. The defendant-patient in the wrongful death case, Mary Lu Redmond, was a city police officer who, while on duty, shot and killed the plaintiff's decedent. After the incident, Officer Redmond participated in about 50 counseling sessions with a therapist employed by the city. That therapist was neither a psychiatrist nor a psychologist, but was a licensed clinical social worker.

When the plaintiff tried to discover what Officer Redmond had said to social worker Breyer in their counseling sessions, both the patient and the therapist objected on grounds of privilege and refused both to provide the therapist's notes and to answer oral questions (or claimed that they could not recall what was said). The trial judge ordered disclosure, and when it did not come, informed the jury that there was no legal justification for the claim of privilege and that the jury could assume the information would be unfavorable to Redmond. On appeal, the 7<sup>th</sup> Circuit reversed and remanded, finding that such a privilege should exist. The Supreme Court granted cert to resolve the split

between the circuits.

The Supreme Court affirmed the existence of the privilege, with regard not only to psychiatrists and psychologists but also to licensed clinical social workers:

All agree that a psychotherapist privilege covers confidential communications made to licensed psychiatrists<sup>2</sup> and psychologists. We have no hesitation in concluding in this case that the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy. The reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker such as Karen Beyer. Today, social workers provide a significant amount of mental health treatment. See, e.g., U.S. Dept. of Health and Human Services, Center for Mental Health Services, Mental Health, United States, 1994, pp. 85-87, 107-114; Brief for National Association of Social Workers et al. as *Amici Curiae* 5-7 (citing authorities). Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, *id.*, at 6-7 (citing authorities), but whose counseling sessions serve the same public goals. Perhaps in recognition of these circumstances, the vast majority of States explicitly extend a testimonial privilege to licensed social workers.<sup>17</sup> We therefore agree with the Court of Appeals that “[d]rawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose.”

*Jaffee v. Redmond*, 518 U.S. 1, 15-17, 116 S. Ct. 1923, 1931-32, 135 L. Ed. 2d 337 (1996).

As you would expect, Justice Scalia vehemently — and entertainingly — disagreed:

I must observe that the Court makes its task deceptively simple by the manner in which it proceeds. It begins by characterizing the issue as “whether it is appropriate for federal courts to recognize a ‘psychotherapist privilege,’” *ante*, at 1925, and devotes almost all of its opinion to that question. Having answered that question (to its satisfaction) in the affirmative, it then devotes *less than a page of text* to answering in the affirmative the small remaining question whether “the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy,” *ante*, at 1931.

*Jaffee v. Redmond*, 518 U.S. 1, 20, 116 S. Ct. 1923, 1933, 135 L. Ed. 2d 337 (1996). Justice Scalia's dissent devotes substantially more room to the difference between psychiatrists and psychologists on the one hand and social workers on the other, concluding that if there is going to be some sort of psychotherapist privilege, it should be restricted to the former:

2 Remember that there is no doctor-patient privilege in federal court, so that the only protection for disclosures to a psychiatrist M.D. is through this psychotherapist privilege. Where the doctor-patient privilege is recognized, a psychiatrist's sessions should fit under that umbrella. [Ford, *not* Supreme Court, footnote]

A licensed psychiatrist or psychologist is an expert in psychotherapy — and that may suffice (though I think it not so clear that this Court should make the judgment) to justify the use of extraordinary means to encourage counseling with him, as opposed to counseling with one's rabbi, minister, family, or friends. One must presume that a social worker does *not* bring this greatly heightened degree of skill to bear, which is alone a reason for not encouraging that consultation as generously. Does a social worker bring to bear at least a significantly heightened degree of skill—more than a minister or rabbi, for example? I have no idea, and neither does the Court....

With due respect, it does not seem to me that any of this [social work] training is comparable in its rigor (or indeed in the precision of its subject) to the training of the other experts (lawyers) to whom this Court has accorded a privilege, or even of the experts (psychiatrists and psychologists) to whom the Advisory Committee and this Court proposed extension of a privilege in 1972. Of course these are only *Illinois'* requirements for "social workers." Those of other States, for all we know, may be even less demanding. Indeed, I am not even sure there is a nationally accepted definition of "social worker," as there is of psychiatrist and psychologist. It seems to me quite irresponsible to extend the so-called "psychotherapist privilege" to all licensed social workers, nationwide, without exploring these issues.

*Jaffee v. Redmond*, 518 U.S. 1, 29-30, 116 S. Ct. 1923, 1938, 135 L. Ed. 2d 337 (1996).

Justice Scalia garnered only one vote, so his position went down 7-2. *Jaffee* remains the law in federal court, meaning that in federal criminal and non-state-law civil cases,<sup>3</sup> there is an absolute privilege for communications by a patient/client to her psychotherapist, whether she has selected a psychiatrist<sup>4</sup>, psychologist, or licensed<sup>5</sup> social worker to fill that role.

### MONTANA: PSYCHOLOGISTS ONLY?

As you will recall from earlier columns, Montana takes the opposite approach to creation of privilege. In our state, evidentiary privileges are restricted to those identified by the Legislature in Title 26 of the Montana Code Annotated. M.C.A. 26-1-807<sup>6</sup> provides such a privilege for some, but not all, mental health professionals:

**26-1-807. Psychologist-client privilege.** The confidential relations and communications between a psychologist and a client must be placed on the same

basis as provided by law for those between an attorney and a client. Nothing in any act of the Legislature may be construed to require the privileged communications to be disclosed. (Emphasis supplied)

Thus, Montana is included in Justice Stevens' list of "all 50 States and the District of Columbia [which] have enacted into law some form of the psychotherapist privilege." *Jaffee*, 518 U.S. at 12. The Court then includes Montana in its list of states that extend that privilege to social workers, but (shockingly?) the M.C.A. does not support that proposition, as I explain below.

#### A. Psychologists are definitely protected by Montana statute

M.C.A. 26-1-807, in both its title and text, is limited to psychologists. The statute itself does not define "psychologist" but M.C.A. Title 37, "Professions and Occupations," Chapter 17, "Psychologists," states:

(4) (a) "Practice of psychology" means the observation, description, interpretation, and modification of human behavior by the application of psychological principles, methods, and procedures for the purpose of eliminating symptomatic, maladaptive, or undesired behavior and improving interpersonal relations, work and life adjustment, personal effectiveness, and mental health.

(b) The practice of psychology includes but is not limited to psychological testing and evaluation or assessment of personal characteristics such as intelligence, personality, abilities, interests, aptitudes, and neuropsychological functioning; counseling, psychoanalysis, psychotherapy, hypnosis, biofeedback, and behavior analysis and therapy; diagnosis and treatment of mental and emotional disorders or disabilities, chemical dependency, substance abuse, and the psychological aspects of physical illness, accident, injury, or disability; and psychoeducational evaluation, therapy, remediation, and consultation.

(5) A person represents to the public that the person is a "psychologist" when the person uses a title or description of services incorporating the words "psychologist," "psychological," "psychologic," or "psychology" and offers to render or renders psychological services described in subsection (4) to individuals, groups, corporations, or the public, whether or not the person does so for compensation or fee.

M.C.A. 37-17-101. M.C.A. 37-17-301 requires psychologists to be licensed; 37-17-302 sets forth the requirements for licensure, which include a doctoral degree in psychology, an examination, and a minimum of two years of supervised experience in the practice of psychology.

Thus, a person who is a licensed psychologist in the state of Montana can guarantee to his clients that their communications are both subject to a duty of confidentiality<sup>7</sup> and privileged from disclosure by M.C.A. 26-1-807. The Montana Supreme Court

3 See last month's column, expanding on the discussion of the last sentence of FRE 501: "But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision."

4 There is no doctor-patient privilege in federal court (see last month), so psychiatrists have to be covered by the psychotherapist privilege or not at all.

5 Justice Scalia observes a difference between "licensed social worker" and "licensed clinical social worker," but the majority opinion specifically uses the less restrictive phrase.

6 This statute was enacted in 1971, and its only amendment was in 2009, as part of a gender-neutralizing rewrite of a number of statutes.

7 This ethical duty is expressed in APA Ethical Standard 4.05, Disclosures.



recognized this privilege and applied it to a sex abuse victim's psychological records in *State v. Duffy*, 300 Mont. 381, 6 P.3d 453 (2000).<sup>8</sup> In *State v. Reynolds*, the rape defendant sought inspection of the victim's mental health records, including those from her psychiatrist and psychologist. The Court ruled:

We further hold that the medical records pertaining to the victim's psychotherapeutic treatment are protected from disclosure by various recognized testimonial privileges which outweigh the defendant's purported need for or limited right to such information in the hands of a non-adversary third party. Section 26-1-807, MCA, provides an unqualified privilege for confidential communications between a psychologist and client. The District Court acted properly in denying defendant's motion to obtain access to Dr. Sievert's, Sandi Burns' and Dr. Newman's records pertaining to Janey Doe.

*State v. Reynolds*, 243 Mont. 1, 8, 792 P.2d 1111, 1115 (1990). More recently, in a non-citable 2009 opinion, the Court affirmed the denial of defendant's request for the mental health records of a non-victim witness for the State, citing both the patient's constitutional and statutory rights to privacy as well as M.C.A. 26-1-807. *State v. Miller*, 352 Mont. 553, 218 P.3d 500, 2009 MT 314N.

<sup>8</sup> This case does recognize the competing right of a criminal defendant to discovery of exculpatory information, and assigned to the trial judge the duty of in camera inspection of the records to ensure that only those which truly are exculpatory are turned over to the defense. Thus, *Duffy* does provide a way around the privilege in some criminal cases, despite the absolute language of the privilege statute.

Note that in order to obtain the protection of M.C.A. 26-1-807, there must be a psychologist-client relationship. When the psychologist is employed by the opponent, this relationship and thus this privilege do not exist, although the party may have other protections. Thomas Park was charged with homicide and forgery, and indicated that he intended to call mental health care providers at trial to support his affirmative defense of extreme mental or emotional stress. The State then sought to have its own expert examine Park for rebuttal purposes, pursuant to M.C.A. 46-14-212. The Supreme Court affirmed the trial court's order for such an examination, but laid out restrictions on such an examination and resulting testimony. Neither the Court nor the defendant made any reference to the psychologist privilege, relying instead on the defendant's constitutional rights against self-incrimination:

¶ 35 First and foremost, we recognize that if a defendant's privilege not to incriminate himself is to have any force, it must mean that he can decide with whom and in what terms he discusses such potentially incriminating matters as the events surrounding the charges against him. Further, a defendant's right to remain silent applies at all stages of a criminal proceeding. ... Therefore, a defendant clearly carries the privilege with him into a psychological examination with the State's expert. ...

The mere fact that a defendant wishes to introduce

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psychological testimony and therefore must cooperate during an examination so that the State has the opportunity to rebut his expert testimony is insufficient to constitute a complete waiver of his right to remain silent. Accordingly, we conclude that a defendant has a constitutional right to remain silent when asked by the State's psychological expert about the events surrounding the alleged offense.

37 It does not follow, however, that a defendant's right to remain silent when questioned by the State's expert about the alleged offense should afford an opportunity to place un rebuttable testimony before the jury....

We reverse that part of the District Court's order that compels Park to answer questions during the examination regarding the alleged offense, but hold that if he refuses to answer those inquiries by the State's expert, and also remains silent at trial, he may not offer that evidence through his expert.

*Park v. Montana Sixth Judicial Dist. Court, Park Cnty.*, 1998 MT 164, 289 Mont. 367, 376-378, 961 P.2d 1267, 1272-74. See also, *State v. Van Dyken*, 242 Mont. 415, 791 P.2d 1350 (1990).

The privilege prevents testimony and documentary evidence about the psychologist-client relationship from being admitted at trial. However, like other statutory privileges, it does not apply to sentencing proceedings:

¶ 31 We have previously stated that "the rules of evidence are not applicable or controlling in sentencing hearings." *State v. Race* (1997), 285 Mont. 177, 180, 946 P.2d 641, 643 (citation omitted). A sentencing court is allowed "to have the fullest information possible concerning the defendant's life and characteristics, so that the court is able to individualize punishment." *Race*, 285 Mont. at 180, 946 P.2d at 643. **Thus, a statement that is covered by the psychotherapist-patient privilege may be inadmissible at trial but is admissible at a sentencing hearing.** *Race*, 285 Mont. at 180-81, 946 P.2d at 643. (Emphasis supplied)

*State v. J.C.*, 2004 MT 75, 320 Mont. 411, 419, 87 P.3d 501, 507.

The psychologist privilege applies in trial cases in Montana state courts, both criminal and civil. Furthermore, because psychologists are included in the psychotherapist privilege in federal court established by *Jaffee*, the psychologist's privilege does not depend on the court system. Therefore, the psychologists' privilege is broader than Montana's doctor-patient privilege in both respects. I would have no compunction about revealing the most difficult information (so long as it does not involve a potential future harm) to a psychologist, confident in its immunity from forced disclosure.<sup>9</sup>

<sup>9</sup> The same caveat about waiver of this privilege in civil cases pursuant to M.R.Civ.P. 35 applies as to waiver of the doctor-patient privilege. See last month's column on doctor-patient privilege.

## B. Psychiatrists are covered by the doctor-patient statute

Psychiatrists are not psychologists, and so are not covered by Montana's psychologist privilege, if that statute is strictly construed. What is the difference? I turned to that trusty source, WebMD, for an explanation:

What's the difference between a psychologist and a psychiatrist?

That may sound like a setup for a knee-slapper, but it's actually a good question, and many people don't know the full answer. It's not as simple as who tends to what, like the difference between a goatherd and shepherd. Both kinds of professionals treat people with problems that vary widely by degree and type, from mild anxiety to schizophrenia. Both can practice psychotherapy, and both can do research.

The short answer is, psychiatrists are medical doctors and psychologists are not. The suffix "-iatry" means "medical treatment," and "-logy" means "science" or "theory." So psychiatry is the medical treatment of the psyche, and psychology is the science of the psyche.<sup>10</sup>

Because they are doctors, Montana's psychiatrists are covered under the doctor-patient privilege statute, although as we saw last month, that privilege applies only in civil cases. Thus, a criminal defendant who consults a psychiatrist for mental health treatment has no valid privilege to prevent disclosure of what he said to his psychiatrist, whereas communications to a psychologist are clearly privileged in both civil and criminal cases. This seems to be counter-intuitive: seeking mental health treatment from an M.D. yields less privilege than using a psychologist, but that is the current status of Montana law. In federal court, under *Jaffee*, psychologists and psychiatrists are treated identically.

## C. Social workers are NOT covered by privilege, although they have a statutory duty of confidentiality

What about licensed social workers who provide mental health services? Again, in federal court under *Jaffee*, as much as Justice Scalia may dislike it, these mental health professionals have the same privilege as psychiatrists and psychologists.

In Montana, the statutory answer is that social workers are not "psychologists" so the privilege extended by MCA 26-1-807 does not cover them, nor does any other statute in the privilege section of the Montana Code Annotated, Title 26 Chapter 1.

Interestingly, the U.S. Supreme Court included Montana in its list of states that "explicitly extend" a privilege for disclosures to licensed social workers, citing M.C.A. 37-22-401.<sup>11</sup> That statute is located in Title 37, entitled "Professions and Occupation," Chapter 22 of which deals with "Social Work." Part 4 deals with regulations for social workers. The specific statute provides:

37-22-401. Privileged communications — exceptions

A licensee may not disclose any information the licensee acquires from clients consulting the licensee in a professional capacity except:

<sup>10</sup> <http://www.webmd.com/mental-health/features/psychology-vs-psychiatry-which-is-better>, last accessed 9/4/2014.

<sup>11</sup> *Jaffee v. Redmond*, 518 U.S. at 17, fn. 17.

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- (1) with the written consent of the client or, in the case of the client's death or mental incapacity, with the written consent of the client's personal representative or guardian;
- (2) that the licensee need not treat as confidential a communication otherwise confidential that reveals the contemplation of a crime by the client or any other person or that in the licensee's professional opinion reveals a threat of imminent harm to the client or others;
- (3) that if the client is a minor and information acquired by the licensee indicates that the client was the victim of a crime, the licensee may be required to testify fully in relation to the information in any investigation, trial, or other legal proceeding in which the commission of that crime is the subject of inquiry;
- (4) that if the client or the client's personal representative or guardian brings an action against a licensee for a claim arising out of the social worker-client relationship, the client is considered to have waived any privilege;
- (5) to the extent that the privilege is otherwise waived by the client; and
- (6) as may otherwise be required by law.** (Emphasis supplied)

This statute has not been substantively changed since its enactment in 1983, and there are no Montana cases construing or applying it. In fact, Westlaw research revealed only two cases nationwide citing this statute, *Jaffee* being one.<sup>12</sup>

With all due respect, I think that Justice Stevens over-relied (or under-analyzed) Montana state law in support of his conclusion that licensed clinical social workers were entitled to share in the psychotherapist privilege. The Montana Supreme Court is the final arbiter of evidence law in our state courts, and it is bound by the plain language of the statutes enacted by the Montana Legislature. The Legislature clearly limits privileged relationships to those specified in Title 26, Chapter 1:

**26-1-801. Policy to protect confidentiality in certain relations.** There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the *cases enumerated in this part*. (Emphasis added)

Psychologists are enumerated in this part; social workers, licensed or not, are not.

The Montana Supreme Court has repeatedly referred to the legislative intent to limit privileges to those specified by statute.

<sup>12</sup> The other is from a federal court in the Southern District of Alabama in 2002, which analyzed the list provided in *Jaffee* to divide states on that list into those which do and do not require licensure of the social worker for recognition of the privilege. *Jane Student 1 v. Williams*, 206 F.R.D. 306 (S.D. Ala., 2002) (concluding that the federal psychotherapist privilege does not extend to unlicensed social workers or unlicensed professional counselors).

For instance:

16 Initially, we observe that testimonial privileges must be strictly construed because they contravene the fundamental principle that the public has the right to everyone's evidence. See *MacKinnon*, ¶ 21 (citing *Trammel v. United States* (1980), 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186, 195).

*State v. Gooding*, 1999 MT 249, 296 Mont. 234, 238, 989 P.2d 304, 307. "While serving these underlying policy goals, the [attorney-client] privilege must be construed narrowly because it obstructs the truth-finding process." *Am. Zurich Ins. Co. v. Montana Thirteenth Judicial Dist. Court*, 2012 MT 61, 364 Mont. 299, 303, 280 P.3d 240, 245. Justice Warner, joined by Justice Rice, observed in another context (venue) "it is not for this Court to add to what has been omitted to a statute." *Maupin v. Meadow Park Manor*, 2005 MT 304, 329 Mont. 413, 416, 125 P.3d 611, 614.

It is true that the words "privilege" and "social worker" do appear together in a statute, but that statute is not located in Title 26 Chapter 1, Part 8, and so is not "enumerated in this part" as required by M.C.A. 26-1-801. Moreover, the exception to the "privilege" in M.C.A. 37-22-401, stated as subpart 6, specifically requires a social worker to disclose confidential information "as may otherwise be required by law." A judge requiring disclosure of the communications in a court proceeding (through discovery or at trial), would certainly be "required by law." My best reading of the social worker statute is that it sets forth a statutory duty of confidentiality, but does not create an evidentiary privilege.

There is one Montana Supreme Court case that implicitly affirms disclosure of a social worker's records while protecting those of a psychiatrist and psychotherapist, without any reference at all to M.C.A. 37-22-401, although it had been enacted seven years earlier. In *State v. Reynolds*, supra, the young adopted daughter who was allegedly raped by her father, spent some time at a mental health facility in Billings after she was removed from the home. There, she was treated by a team of mental health care providers, including a psychiatrist, a psychotherapist<sup>13</sup>, and a social worker (Rochelle Beley). The defendant wanted access to all these records, but as discussed above, the trial court and Supreme Court both held that the psychiatrist and psychotherapist records were privileged:

We further hold that the medical records pertaining to the victim's psychotherapeutic treatment are protected from disclosure by various recognized testimonial privileges which outweigh the defendant's purported need for or limited right to such information in the hands of a non-adversary third party. Section 26-1-807, MCA, provides an unqualified privilege for confidential communications between a psychologist and client. The District Court acted properly in denying defendant's motion to obtain access to Dr. Sievert's, Sandi Burns' and Dr. Newman's records pertaining to Janey Doe.

<sup>13</sup> The case never defines the exact qualifications of this "psychotherapist" and it is not clear if in fact the patient or the prosecutor asserted the psychologist privilege: "The prosecutor also agreed to ask psychotherapist Sandi Burns to bring her records for a similar *in camera* inspection, but defense counsel made no further request for inspection." 243 Mont. at 7.

*State v. Reynolds*, 243 Mont. 1, 8, 792 P.2d 1111, 1115 (1990). However, without any critical comment, the Court also observed that the judge had allowed the defense to access to the social worker's records:

The files of Rochelle Beley, including any reports therein from Rivendell and Billings Deaconess Hospital's 2-North Psychiatric Unit, were subjected to an *in camera* inspection by defense counsel.

While allowing an inspection of Rochelle Beley's file, the District Court denied motions as to all other records. ...

243 Mont. at 7, 792 P.2d at 1115 (1990). Presumably, no one in the case made any claim to privilege for a social worker, and the Court certainly did not blink at the disclosure of her records. Reynolds' conviction was affirmed.

The primary reason that the U.S. Supreme Court extended the privilege to licensed social workers in *Jaffee* was the Court's reasoning that the many Americans receive their mental health treatment from the most numerous, and least expensive, providers: social workers. Justice Scalia's dissent questioned the truth of this proposition, and argued that such a decision was better left to the legislative branch. In Montana, where privileges are purely statutory, the Legislature has not yet been convinced to take such

a step. Social workers' clients do not have any privilege for their communications. I do not know if the clients or their providers are aware of this situation, but my hunch is that both sides assume that the duty of confidentiality is all they need. It is not.

## CONCLUSION

There is a clear privilege in both civil and criminal proceedings in Montana state courts for communications between a psychologist and a patient. Communications between a psychiatrist and a patient are privileged under the doctor-patient privilege, which applies in civil but not criminal cases, because a psychiatrist is a doctor. Communications between a client and a licensed social worker should be kept confidential by the social worker per the statutes regulating the profession, but are likely to be subject to disclosure in both civil and criminal court proceedings despite an objection of "privilege."

The Legislature should clarify the status of the mental health privilege, and if it concludes that social workers are entitled to a privilege, expand M.C.A. 26-1-807 to include licensed clinical social workers as well as psychologists and psychiatrists. In the meantime, Montanans who wish to keep their disclosures to a mental health practitioner privileged should go to psychologists, and not to either psychiatrists or social workers.

### McGrath, from page 19

University Law School, he served as a Reginald Heber Smith Community Lawyer Fellow in Reno, Nevada, providing legal services to low-income clients.

And as chief justice, Krueger said, McGrath has fought to promote and establish self-help centers throughout Montana,

and he has made continued funding of self-help centers and pro bono services among his top priorities.

"Chief Justice Mike McGrath deserves to be recognized for improving access to the judicial system and a distinguished legal career that has demonstrated not only a personal commitment and dedication, but also excellence in the development of practices to expand and impact the delivery of legal services to the unrepresented Montana population," Krueger said.

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