

MAINE STATE LEGISLATURE

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121st MAINE LEGISLATURE

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Legislative Document

No. 1214

H.P. 888

House of Representatives, March 6, 2003

An Act Regarding Confidentiality and Mental Health

Reference to the Committee on Judiciary suggested and ordered printed.

Millicent M. MacFarland
MILLICENT M. MacFARLAND
Clerk

Presented by Representative MARLEY of Portland.
Cosponsored by Representatives: CANAVAN of Waterville, HUTTON of Bowdoinham,
PATRICK of Rumford, SUSLOVIC of Portland.

2 **Be it enacted by the People of the State of Maine as follows:**

4 **Sec. 1. 16 MRSA §53-D** is enacted to read:

6 **§53-D. Privileged communications to licensed counseling
professionals or licensed clinical social workers**

8 **1. Definitions.** As used in this section, unless the
10 context otherwise indicates, the following terms have the
following meanings.

12 A. "Confidential communication" means information,
14 including information obtained by examination of a patient,
transmitted between a patient and an LCP or between a
16 patient and an LCSW in the course of the relationship
18 between the patient and the LCP or LCSW and in confidence by
a means that, so far as the patient is aware, discloses the
20 information to no 3rd persons other than those who are
present to further the interest of the patient in any
22 consultation or those to whom disclosure is reasonably
necessary for the transmission of the information or the
accomplishment of any purpose for which the LCP or LCSW is
24 consulted. "Confidential communication" includes a
diagnosis made and the advice given by the LCP or LCSW in
26 the course of the relationship.

28 B. "Holder of the privilege" means:

30 (1) The patient, when the patient has no guardian or
conservator;

32 (2) A guardian or conservator of the patient when the
34 patient has a guardian or conservator; or

36 (3) The personal representative of the patient if the
patient is deceased.

38 C. "Licensed clinical social worker" or "LCSW" means a
40 person licensed under Title 32, chapter 83.

42 D. "Licensed counseling professional" or "LCP" means a
person licensed under Title 32, chapter 119.

44 E. "Patient" means a person, couple, family or group that
46 consults an LCP or LCSW or submits to an examination by an
LCP or LCSW for the purpose of securing a diagnosis or
48 preventive, palliative or curative treatment of the
consulting person's mental or emotional condition or who
submits to an examination of the person's mental or

2 emotional condition for the purpose of scientific research
3 on mental or emotional problems.

4 2. Privileged communications. Except as provided in
5 subsection 3, a patient has a privilege to refuse to disclose,
6 and to prevent another from disclosing, a confidential
7 communication between patient and LCP or between patient and LCSW
8 if the privilege is claimed by:

10 A. The holder of the privilege;

12 B. A person who is authorized by the holder of the
13 privilege to claim the privilege; or

14 C. The person who was the LCP or LCSW at the time of the
15 confidential communication, but such a person may not claim
16 the privilege if there is no holder of the privilege in
17 existence or if the LCP or LCSW is otherwise instructed by a
18 person authorized to permit disclosure.

20 3. Exceptions. There is no privilege under this section:

22 A. As to a communication relevant to an issue concerning
23 the mental or emotional condition of the patient if that
24 issue has been raised by:

26 (1) The patient;

28 (2) A party claiming through or under the patient;

30 (3) A party claiming as a beneficiary of the patient
31 through a contract to which the patient is or was a
32 party; or

34 (4) The plaintiff in an action for damages for the
35 injury or death of the patient;

38 B. If the LCP or LCSW is appointed by court order to
39 examine the patient, except when the LCP or LCSW is
40 appointed by court order upon the request of a lawyer for a
41 defendant in a criminal proceeding in order to provide the
42 lawyer with information needed to enable the lawyer to
43 advise the defendant whether to enter or withdraw a plea
44 based on insanity or to present a defense based on the
45 defendant's mental or emotional condition;

46 C. If the services of the LCP or LCSW were sought or
47 obtained to enable or aid any person to commit or plan to
48 commit a crime or a tort or to escape detection or
49 apprehension after the commission of a crime or a tort;
50

2 D. As to a communication relevant to an issue between
4 parties all of whom claim through a deceased patient,
regardless of whether the claims are by testate or intestate
succession or inter vivos transaction;

6
8 E. As to a communication relevant to an issue concerning
the intention of a patient, now deceased, with respect to a
10 deed of conveyance, will or other writing executed by that
patient, purporting to affect an interest in property;

12 F. In a proceeding initiated at the request of the patient,
14 who is a defendant in a criminal action, to determine the
patient's sanity;

16 G. If the LCP or LCSW has reasonable cause to believe that
18 the patient is in such a mental or emotional condition as to
be dangerous to the patient or to the person or property of
20 another and that disclosure of the communication is
necessary to prevent the threatened danger;

22 H. In a proceeding brought by or on behalf of the patient
to establish the patient's competence;

24
26 I. As to information that the LCP or LCSW is required by
law to report to a public official; or

28 J. In a child protection proceeding in which the information
30 is determined by the court to be necessary for determination
of any issue involving the health, safety or welfare of a
32 child or pursuant to an investigative subpoena issued
pursuant to Title 22, section 4021.

34 **4. Waiver of privilege.** This subsection governs waiver of
36 the privilege provided by this section.

38 A. Except as otherwise provided in this section, the right
of any person to claim a privilege under this section is
40 waived with respect to a communication protected by the
privilege if any holder of the privilege, without coercion,
42 has disclosed a significant part of the communication or has
consented to such a disclosure made by anyone. Consent to
44 disclosure is manifested by any statement or other conduct
of the holder of the privilege indicating consent to
46 disclosure, including failure to claim the privilege in any
proceeding in which the holder has the legal standing and an
opportunity to claim the privilege.

48
50 B. When 2 or more persons are joint holders of a privilege
under this section, a waiver of the right of a particular

2 joint holder to claim the privilege does not affect the
3 right of another joint holder to claim the privilege.

4 C. A disclosure that is itself privileged is not a waiver
5 of any privilege.

6 D. A disclosure in confidence of a privilege under this
7 section is not a waiver of the privilege if the disclosure
8 is reasonably necessary for the purpose for which the
9 licensed counseling professional or licensed clinical social
10 worker was consulted.

11 5. No comment or inference permitted. If a privilege under
12 this section is or was exercised in the instant proceeding or on
13 a prior occasion, neither the presiding officer nor counsel may
14 comment upon the exercise of the privilege, and no presumption
15 arises because of the exercise. The trier of fact may not draw
16 any inference from the exercise of the privilege as to the
17 credibility of the witness or as to any matter at issue in the
18 proceeding. At the request of a party who may be adversely
19 affected by an inference that may be drawn by the jury, the court
20 shall instruct the jury that no presumption arises because of the
21 exercise of the privilege and the jury may not draw an inference
22 from the exercise of the privilege as to the credibility of the
23 witness or as to any matter at issue in the proceeding.

24 6. Court ruling on claim of privilege. When a court is
25 ruling on a privilege under this section and is unable to do so
26 without requiring disclosure of the information claimed to be
27 privileged, the court may require the persons from whom
28 disclosure is sought or other person authorized to claim the
29 privilege, or both, to disclose the information in chambers out
30 of presence and hearing of all persons except the person
31 authorized to claim the privilege and others permitted by that
32 person. If the judge determines that the information is
33 privileged, neither the judge nor any other person may ever
34 disclose what was disclosed in chambers without the consent of
35 the person authorized to permit disclosure.

36 7. Burden of proof. When a privilege is claimed on the
37 ground that the matter sought to be disclosed is a communication
38 made in confidence in the course of the relationship between
39 patient and LCP or patient and LCSW, the communication is
40 presumed to have been made in confidence and the opponent of the
41 claim of privilege has the burden of establishing that the
42 communication was not confidential.

43 8. Access for reimbursement or review not denied. This
44 section does not prevent a 3rd-party reimbursor, in the ordinary
45 course of determining eligibility for or entitlement to benefits,
46 from inspecting and copying records relating to diagnosis,
47 evaluation, treatment, or other services.

2 treatment or other services provided to any person, including a
3 minor or incompetent person, for which coverage, benefit, or
4 reimbursement is claimed as long as the policy or certificate
5 under which the claim is made provides that access to those
6 records is permitted. Disclosure of confidential communications
7 to the 3rd-party reimbursor for the purpose specified in this
8 subsection is not an express or constructive waiver of the
9 privilege with regard to that confidential communication. This
10 section does not prevent access to any records pursuant to any
11 peer review or utilization review procedure applied and
12 implemented in good faith.

13 9. No repeal of other privileges. This section does not
14 repeal by implication any other statute or rule of court relating
15 to privilege.

16 Sec. 2. 32 MRSA §7061-A is enacted to read:

17 §7061-A. Privileged communication

18 When present and authorized to do so, a person licensed
19 under this chapter shall claim the privilege provided under Title
20 16, section 53-D for confidential communications between a
21 patient and the licensed person.

22 Sec. 3. 32 MRSA §13862, as amended by PL 2001, c. 345, §10,
23 is repealed and the following enacted in its place:

24 §13862. Privileged communication

25 When present and authorized to do so, a person licensed
26 under this chapter shall claim the privilege provided under Title
27 16, section 53-D for confidential communications between a
28 patient and the licensed person.

29 **SUMMARY**

30 This bill revises and expands the current laws regarding the
31 privilege against disclosure of confidential communications
32 between patients and licensed counseling professionals, such as
33 marriage and family therapists, and between patients and licensed
34 clinical social workers. It provides a number of exceptions to
35 the privilege, including allowing disclosure: in certain
36 criminal proceedings; when the patient is deceased and the
37 information is needed regarding a will or deed; when reporting is
38 required by law, such as reporting of child abuse or elder abuse;
39 and when needed to determine certain matters in a child
40 protection proceeding. The bill also specifies when the privilege
41 is considered to be waived and sets forth procedures for courts
42 in handling claims of privilege.