The Devil's Advocate

Dear Dr. _____: November 15, 1978

You may be interested in a sketch of the argument I was preparing as the basis for a claim of the privilege of confidentiality so as to exclude your testimony in the disputed custody case. It may have some relevance to your practice as a child psychiatrist and future problems which may develop.

The pertinent New York statute (Civil Practice Law & Rules §4504) provides in part: "*Unless the patient waives the privilege,* a person licensed to practice medicine . . . shall not be allowed *to disclose any information which he acquired in attending a patient* in a professional capacity, and which was necessary to enable him to act in that capacity . . ." (emphasis supplied).

I was going to argue that (1) there had been no effective waiver of the privilege by your seven year-old patient, (2) that the information sought to be obtained from you was acquired by you as the *attending or treating physician* and was therefore privileged, since it was (3) confidential information, and (4) more harm than good would be occasioned by a forced disclosure. More specifically the arguments would have been:

(1) Since disclosure would have adverse effects upon your continued treatment of the patient it would be highly improper for any court appointed law guardian for the child to purport to waive your patient's privilege, and the court in the proper exercise of its discretion should remove the law guardian if he attempted to waive the child's privilege of confidentiality in disregard of the consequences to his continued care and treatment. There is no doubt that the court would be empowered to remove a particular law guardian who was not properly concerned about the child's welfare.

(2) There also is no doubt that the disclosures by the child to you were confidential, and that is reinforced by your commitment to the child to hold his communications in confidence. I assume that there were no third persons present at the time of disclosure so as to make the situation one that was not confidential. Moreover, the law makes a distinction between disclosures made to a treating physician (such as yourself) and one who has been designated to make an evaluation but not to treat. See *People v. Decina,* 2 N.Y. 2d 133, 157 N.Y.S. 2d 558 (1956); and *Milano v. State,* 44 Misc. 2d 290, 253 N.Y.S. 2d 662 (Court of Claims 1964). Obviously, the distinction is sound because of the different purposes of the examinations and the future relationship that are involved. The most helpful case to claiming privilege probably is *Yaron v. Yaron,* 83 Misc. 2d 276, 372 N.Y.S. 2d 518 (Sup. Ct. N.Y.

Co. 1975), where Justice Blyn held that remarks made to a family counseling agency (Jewish Family Service) where the spouses had gone for marriage counseling were privileged and could not be admissible in a divorce proceeding involving a custody issue, absent waiver of the privilege. That decision involved the physician-patient, social worker-client, and psychologist-patient relationships since the parties were seen by agency staff from all three disciplines.

(3) There would have been no difficulty in establishing that the information which you preferred not to reveal was confidential in character.

(4) I also believe we might have been able to persuade the court that more harm than good would have resulted from any forced disclosure, since it is imperative that you retain the trust and confidence of your seven year-old patient in order to continue successful therapy and to avoid the disturbance that a change in therapists might occasion. Your case is a stronger one than Justice Blyn's decision in *Yaron v. Yaron.* Further, your case differs from others which involved adult patients who placed their mental and physical condition at issue in the particular proceeding, thus impliedly waiving privilege, and also from cases where the state was trying to use the physician-patient privilege as a shield to avert liability for improper release of a dangerous patient. See *Milano v. State,* cited previously. In your case, the patient is not seeking any advantage, he is not a party to the legal case and has no control over it, and he would be claiming the privilege for the very purpose it was intended to serve, namely, to preserve that relationship of trust and confidence which is so necessary for his improvement. Therefore, on balance, it is most reasonable to argue that impairment of his continued course of treatment is a far greater harm than non-disclosure would be, considering that he is a disturbed seven year-old child and his statement would at most have only slight impact on the outcome of the case.

We might have been able to win the issue before a sensitive judge who had some background in psychiatry and law. We would have summarized our position by saying that cases which reject privilege in order to obtain needed information are not in point where it is the very need of the child that disclosure be averted, and that since the child's best interest is the ultimate issue, such may be achieved only by maintaining confidentiality with regard to his statements even though those of his parents might properly be admissible under a weighing and balancing approach in terms of detriments and benefits.

Considering the fact that the hearing was called off insofar as your testimony is concerned, you may reimburse my firm in the amount of $_____ the time I spent on legal research today. I hope to have the pleasure of meeting you in person and trust that this letter may be of some help.

Sincerely,
HENRY H. FOSTER, Counsel

The day after the above letter was written, the local law journal reported

the case of *Hickox v. Hickox*, which had been decided by the intermediate appellate court of New York. In that decision the First Department unanimously held that Payne-Whitney must produce psychiatric records relating to a mother who was involved in a disputed child custody case. It was noted, however, that the subpoena merely directed Payne-Whitney to have the records in court "so that the court may make appropriate direction with respect to the use of such documents." The procedure was to leave the records with the Medical Reports Office of the court, where they would be available for inspection only upon a court order.

In reaching this result, the Appellate Division expressly rejected Justice Blyn's decision in *Yaron v. Yaron*, referred to in the above letter, and Blyn's notion that "any communication which is privileged when made remains privileged forever" unless the privilege is waived by the patient. In actively contesting the child custody case, said the Appellate Court, the mother thereby placed her mental and emotional well-being into issue. Moreover, said the court, the physician-patient privilege is not absolute even when not waived, and it might have to yield to the dominant duty of the courts to guard the welfare of wards (citing: *Perry v. Fiumane*, 61 A.D. 2d 512 (1978), and *Matter of Schulman v. New York City Health & Hospitals Corp.*, 44 A.D. 2d 482 (1974)).

In effect, the holding in *Hickox* required Payne-Whitney to hand the records over to the trial court but did not pass upon whether the privilege had been waived, or was inapplicable, and statements in that connection were merely dicta. Presumably, the trial judge will screen the medical records in terms of relevance as was done in *In re Lifschutz*, 467 P. 2d 557 (Calif. 1970). If at trial the mother's attorney offers psychiatric testimony in support of her request for a change from joint custody, as stipulated in the agreement of the parties, to sole custody for the mother, relevant portions of the Payne-Whitney records may be admitted into evidence under the waiver doctrine.

The Appellate Division also disavowed any intent to discourage contestants for custody from seeking psychiatric or other help out of fear that confidences would be "unfairly and unnecessarily revealed through the animus of a present or former spouse. To avoid such potentially chilling effects, it is apparent that these privileges may not cavalierly be ignored or lightly cast aside. There first must be a showing beyond 'mere conclusory statements' that resolution of the custody issue requires revelation of the protected material." Accordingly, the Appellate Court ordered that there shall be no disclosure of the medical records to the adverse parties except to the extent that the trial court shall direct, after the trial court itself had made a preliminary examination. Finally, the court also noted that "Obviously it would be improper to permit disclosure of these records simply for the purpose of enabling the husband in the pending *divorce action* to attempt to prove adultery on the part of the wife." (emphasis supplied)

Approximately a month later, Justice Blyn in *N. v. N.* (NYLJ Dec. 11, 1978) considered the effect of *Hickox v. Hickox* on a different set of facts. The mother's counsel, in a custody dispute, served two subpoenas *duces tecum*, one on the defendant father, and a second on the Bureau of Controlled Substances of the Department of Health. The father in the

custody dispute was a physician, and it was claimed by the mother that he wrote prescriptions in other persons' names for his own use, and that such practice was relevant to his fitness as a parent. The subpoena served on the defendant-father called for the production of all prescriptions written by him between specified dates for designated controlled substances. The other subpoena requested the same data from the Bureau of Controlled Substances.

Justice Blyn sustained the subpoena served on the defendant-father on the basis of the decision in *Hickox* but quashed the subpoena served on the Bureau because Section 3371 of the Public Health Law expressly limits disclosure of such records to criminal proceedings, and this was a civil suit over custody.

Justice Blyn's decision shows the extent to which privilege and confidentiality are controlled by statute, especially in the case of the physician-patient privilege. The material sought was the same material in both of the subpoenas served in *N. v. N.* The express language of the Public Health Law shielded the material sought from the Bureau, but the statutory physician-patient privilege did not immunize the material in possession of the doctor-father. With regard to the latter, under *Hickox,* the postulated need to have the evidence might override the privilege in nay event, the privilege not being "absolute." Thus, the physician-patient privilege in New York is qualified, but the statutory privilege of the Bureau is absolute insofar as civil cases are concerned.

The practical result in *N. v. N.* is that counsel for the mother obtained the doctor-husband's records but not those of the Bureau which would confirm or refute the accuracy of the doctor's records. Denial of access to the latter impairs opposing counsel's chances for attacking the doctor-husband's credibility or the inaccuracy of the records he produced but permits the court to at least examine the doctor's own records for whatever that may be worth. In passing, it may be noted that in any event the records in question were of doubtful or peripheral value for the determination of parental fitness or the placement of the child. Unless the doctor's alleged activities had a direct bearing on child rearing, or would land him in jail, they are of doubtful relevance.

It should be obvious from the above that different situations should and do receive differing treatment by the law pertaining to confidentiality and privilege. The situation discussed in my letter to the psychiatrist, namely, that of the confidential relationship between the treating psychiatrist and the child, is the strongest case for the shield of privilege to operate and stands on a different footing from the privilege claimed by a spouse or parent when the issue involves grounds for divorce or custody and visitation. The child in our case, which was called off, did not waive the privilege, either expressly or by implication, and his therapeutic needs should receive priority. However, the psychiatrist, in telling his young patient that communications were confidential, should have stated the caveat that confidentiality would be maintained except where disclosure was required by law.

With reference to the parent-patient privilege where custody is at issue, *Hickox,* at least by dicta, holds that the interest of confidentiality is

subordinate to the court's need to know relevant information bearing on child custody. But even *Hickox* tempers its order of priorities by utilizing the procedural device of having psychiatric reports turned over to the Medical Reports Office rather than to opposing counsel. Of course, many therapists will dispute such a priority and will contend that their parent-patient needs confidentiality and privilege in the treatment process and that such is more important than the court's need for full facts for custody determinations. It might be further argued that since custody and visitation awards are always modifiable, judicial errors are subject to correction, so little if any substantial harm is done in invoking a shield.

Courts are not apt to accept the above argument because of overwhelming concern for their role as *parens patriae*, which they regard as both a burden and a trust. The ward and the squire of Black Acre long have been special favorites of the common law and they both will receive zealous protection under our system of justice. This emotional commitment is so strong that only catastrophic circumstances will overcome this sense of duty, and on the judicial scale of value the welfare of the child rates 10 and the therapeutic needs of a parent-patient rates at most 8. By the same token, and for the same reason, I believe that my client the child psychiatrist would have prevailed under the circumstances described in my letter and that confidentiality would have been maintained. After all, the judge might at his discretion examine the child in camera, so little if any harm would have been done to the fact-finding process if the child's communications to his psychiatrist were deemed to be privileged, and to clinch the matter there is no basis for an argument that the child-patient waived confidentiality by himself placing his custody in issue. Ironically, children are not parties to custody disputes.

HENRY H. FOSTER, Esquire