

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 109

Clinical, Counseling, and Psychotherapy Services

SPONSOR(S): Bembyr

TIED BILLS: None

IDEN./SIM. BILLS: SB 498

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Civil Justice & Courts Policy Committee	6 Y, 0 N	Bond	De La Paz
2)	Criminal & Civil Justice Policy Council	12 Y, 0 N	Bond	Havlicak
3)	Health Care Regulation Policy Committee	6 Y, 0 N	Cicccone	Calamas
4)	Health & Family Services Policy Council	20 Y, 0 N	Lowell	Gormley
5)	Policy Council		Phillips	Hogge

SUMMARY ANALYSIS

Currently, like other healthcare professions, communications between patients or clients (patients/clients) and the practitioner are generally confidential. With this said, a licensed or certified clinical social worker, marriage and family therapist, or mental health counselor has the *option* of whether or not to disclose such confidential communications when there is a threat of physical harm to the patient/client, other individuals or society.

Without specific statutory authority, when a licensed practitioner chooses to waive confidentiality and disclose the patient/client threat and the threat is acted upon, the practitioner risks being sued for emotional distress by the patient/client. Conversely, if the practitioner chooses *not* to disclose the confidential threat, existing law protects them from being sued.

This bill provides that there is no liability for disclosing otherwise confidential communication when a licensed or certified clinical social worker, marriage and family therapist, or mental health counselor notifies a potential victim or law enforcement when there is a clear and immediate probability of physical harm to the patient/client, to other individuals or to society.

This bill does not appear to have a fiscal impact on state or local government.

The bill is effective July 1, 2009.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Chapter 491, Florida Statutes, regulates the medical practices of persons who are not psychiatrists and who are providing clinical, counseling and psychotherapy services. These licensed practitioners are regulated by the Board of Clinical Social Work, Marriage and Family Therapy, and Mental Health Counseling within the Department of Health.

Like other healthcare professions, communications between patients/clients and the practitioner are generally confidential. The legislative intent for the chapter speaks, in part, to the issue of confidentiality:

The Legislature finds that as society becomes increasingly complex, emotional survival is equal in importance to physical survival. Therefore, in order to preserve the health, safety, and welfare of the public, the Legislature must provide privileged communication for members of the public or those acting on their behalf to encourage needed or desired counseling, clinical and psychotherapy services, or certain other services of a psychological nature to be sought out.¹

Accordingly, Section 491.0147, F.S., provides that "[a]ny communication between any person licensed or certified under this chapter and her or his patient or client shall be confidential." However, there are three conditions under which secrecy *may* be waived, the latter of which is addressed by this bill:

- When the patient/client is suing the licensed person;
- When the patient/client consents to disclosure; and,
- When there is possibility of physical harm to the patient/client or another.

A licensed person who discloses confidential communications, other than those within one of the exceptions, is subject to professional discipline.²

A decision to waive the confidentiality under s. 491.0147, F.S., is made by the licensed or certified person, not the patient/client and is permissive in nature, not mandatory. As a result, a licensed or certified person who decides not to waive the confidentiality may not be sued by an individual who is harmed when the client or patient follows through with the threat.³ Conversely, a licensed or certified

¹ s. 491.002, F.S.

² s. 491.009(1)(u), F.S., provides for discipline of a licensed person for "[f]ailure of the licensee, registered intern, or certificateholder to maintain in confidence a communication made by a patient or client in the context of such services, except as provided in s. 491.0147."

³ *Green v. Ross*, 691 So.2d 542 (Fla. 2nd DCA 1997) (finding no duty to warn).

person who discloses confidential information about a client or patient without statutory authority may be sued for emotional distress by the patient/client.⁴ The effect of current law and noted court decisions is that a licensed or certified person may avoid being sued by never disclosing threats of harm to an innocent third party, but risks suit when warning victims or notifying law enforcement of such threats.

Psychiatrists, who similarly treat persons with mental disorders and who face the same dilemma regarding when to disclose a patient's or client's threat to the victim or law enforcement, are statutorily protected from suit when disclosing a threat to the potential victim or to law enforcement.⁵

Effect of Bill

This bill amends s. 491.0147, F.S., to provide that there is no liability for disclosing otherwise confidential communication when a licensed or certified clinical social worker, marriage and family therapist, or mental health counselor notifies a potential victim or law enforcement when there is a clear and immediate probability of physical harm to the patient/client, to other individuals or to society.

B. SECTION DIRECTORY:

Section 1 amends s. 491.0147, F.S., regarding confidential and privileged communications.

Section 2 provides an effective date of July 1, 2009.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

⁴ *Gracey v. Eaker*, 837 So.2d 348 (Fla. 2002).

⁵ s. 455.059, F.S., which provides in part: "No civil or criminal action shall be instituted, and there shall be no liability on account of disclosure of otherwise confidential communications by a psychiatrist in disclosing a threat pursuant to this section."

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

None.